

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF MISSOURI
3 WESTERN DIVISION

4 STEVE WILDMAN, et al.,) Case No. 4:16-CV-00737-DGK
5)
6 Plaintiffs,)
7)
8 VS.)
9)
10 AMERICAN CENTURY SERVICES,)
11 LLC, et al.,)
12)
13 Defendants.) September 17, 2018
14) Kansas City, Missouri
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10 VOL 9 (Pages 1988 - 2267)
11 TRANSCRIPT OF BENCH TRIAL
12 BEFORE GREG KAYS
13 UNITED STATES CHIEF DISTRICT JUDGE
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23 Proceedings recorded by mechanical stenography, transcript
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1 (Begin proceedings in open court at 9:05 a.m.)

2 THE COURT: Okay. Mr. Fleckner, you have some
3 business for us today?

4 MR. FLECKNER: Yeah. Just two housekeeping matters,
5 Your Honor, this morning.

6 THE COURT: Yes.

7 MR. FLECKNER: I think during Mr. Falvey's exam on
8 Friday, we had started to change the way we were marking our
9 demonstratives to give them DX numbers, just to clear the
10 record.

11 THE COURT: Okay. Thank you.

12 MR. FLECKNER: As so I understand Ms. Cunningham has
13 swapped out the demonstratives that we've been using so far
14 with yourself and the clerk with the DX numbers.

15 THE COURT: Okay.

16 MR. FLECKNER: But if you don't mind, if you'd just
17 indulge me a moment, I'd like to read nine DX numbers into the
18 record and --

19 THE COURT: Yeah. And, you know, it's my habit, for
20 the record, to interrupt when I'm a little bit confused about
21 maybe corresponding numbers, as you all have seen. I -- part
22 of it is my notes that I have to come back to and making sure
23 that if there's any differences, you all, like -- like
24 Mr. Leis' notes -- I think, you know, Mr. Lukas, you did a
25 good job of saying these are the same as JX whatever, but

1 these have Mr. Leis' annotations attached to it. That kind of
2 stuff really helps me. And I'm really -- I want to make a
3 record, but I'm also trying to make good notes here too,
4 right? So please be mindful of that. Thank you.

5 MR. FLECKNER: Understood. And going forward, we'll
6 make sure to use the right convention. We didn't realize
7 until midway through that sometimes there was a discrepancy.
8 So --

9 THE COURT: Yes, sir.

10 MR. FLECKNER: -- if I could just read for the
11 record what had previously been marked as Morrison 1 for
12 demonstrative is DX 840; Morrison 2 is DX 841; Bouffard 1 is
13 DX 842; Bouffard 3 is DX 843; Bouffard 4 is DX 844; Bouffard 5
14 is DX 845; opening slide 23, which was just the pictures of
15 the Committee members, is DX 846; Gilstrap 1 is DX 847; and
16 Gilstrap 2 is DX 848.

17 And we submitted those to plaintiffs. I think they
18 were comfortable with those exchanges. And we would just like
19 to move their introduction for demonstratives purposes only.

20 MR. LUKAS: Your Honor, we assume Ms. Cunningham put
21 those together, not Mr. Fleckner, so we have no objection to
22 it.

23 THE COURT: Thank you, Mr. Lukas.

24 (Defendants' Exhibits 840 through 848 admitted in
25 evidence.)

1 MR. FLECKNER: And the second item of housekeeping,
2 Your Honor, just real quick, just to update you, you had asked
3 me on Friday what the rest of our case looked like.

4 THE COURT: Yes, sir.

5 MR. FLECKNER: And we were able to make accomodation
6 to the Court's schedule to try and winnow this down a little
7 bit. So we wanted to alert the Court that after Mr. Cowherd,
8 we still intend to call two fact witnesses who are members of
9 the Committee and are defendants in this case, but we've
10 reduced the number of experts that we anticipate calling from
11 three to two.

12 And with that, defendants fully anticipate that
13 we'll be in a position to rest our case by Thursday, and maybe
14 even by Tuesday. We've exchanged some time estimates --

15 THE COURT: Okay.

16 MR. FLECKNER: -- over the weekend with plaintiffs
17 and it could be that we're done by Tuesday, just depending how
18 the time goes.

19 THE COURT: Very good. Thank you.

20 MR. LUKAS: And with regards to the expert that they
21 withdrew, Your Honor, they told us about this last night. We
22 intend -- just as heads-up -- this is premature, but I'm just
23 going to tell you, as a heads-up --

24 THE COURT: Yes, sir.

25 MR. LUKAS: -- we intend to offer the relevant

1 portions of his deposition as rebuttal -- rebuttal to
2 testimony that's already been given and rebuttal to testimony
3 we believe will be given with their experts. It's premature
4 because it would be rebuttal testimony. But we just want to
5 give everybody a heads-up so I don't stand up tomorrow
6 afternoon when they close and spring it on everybody. That's
7 all.

8 THE COURT: Yes, sir. I understand.

9 MR. LUKAS: Okay.

10 THE COURT: I understand.

11 MR. LUKAS: And I'm ready to proceed if --

12 THE COURT: And you're still doing a cross on --
13 on -- on Mr. Chattem -- or Mr. Cowherd. I'm sorry.

14 THE WITNESS: That's okay.

15 THE COURT: Chattem is your first name?

16 THE WITNESS: Chatten, yes.

17 THE COURT: Chatten. Okay.

18 THE WITNESS: Yes.

19 THE COURT: Mr. Cowherd, sir, I remind people
20 they're still under oath. And would you please begin by
21 speaking your full name and spelling your last name for our
22 record --

23 THE WITNESS: Okay.

24 THE COURT: -- again?

25 THE WITNESS: Chatten William Cowherd,

1 C-O-W-H-E-R-D.

2 THE COURT: Thank you, Mr. Cowherd.

3 All right, Mr. Lukas. Thank you, sir. Please
4 proceed.

5 MR. LUKAS: Thank you, Your Honor.

6 CHATTEN WILLIAM COWHERD, DEFENDANTS' WITNESS, PREVIOUSLY SWORN

7 CROSS-EXAMINATION (continued)

8 BY MR. LUKAS:

9 Q. Good morning, Mr. Cowherd.

10 A. Good morning.

11 Q. Do you remember on Friday your testimony about independent
12 consultants where I believe you testified that you had used an
13 independent consultant to provide expertise? Do you remember
14 that?

15 A. Independent consultant for our Committee?

16 Q. Right.

17 A. Have we provided one?

18 Q. No. I was just -- I was just refreshing your recollection
19 of your testimony that since -- I believe your testimony was
20 that since you had house expertise -- or in-house expertise,
21 you thought it wasn't necessary to have an expert or an
22 outside consultant; is that right?

23 A. Correct.

24 Q. Okay. And as a fiduciary, do you think it's important to
25 make a careful and impartial investigation of all your

1 investment decisions?

2 A. I do.

3 Q. And considering the fact that the Retirement Committee was
4 retaining and considering only American Century funds, don't
5 you think it would have been prudent to obtain the impartial
6 guidance of a disinterested outside advisor?

7 MR. FLECKNER: Objection. Misstates. They used
8 Vanguard funds, and we know they didn't only consider American
9 Century funds.

10 THE REPORTER: Could you speak up, please?

11 MR. FLECKNER: I'm sorry. I'll speak into the
12 microphone. My objection -- do you need me to repeat it?

13 THE REPORTER: If you could.

14 MR. FLECKNER: Objection. Misstates. We know they
15 used Vanguard funds and didn't just consider American Century
16 funds.

17 THE COURT: Just qualify that for us because --

18 MR. LUKAS: Sure.

19 THE COURT: -- it does presuppose certain facts.

20 MR. LUKAS: Sure.

21 Q. Let's set aside the 2016 addition of the Vanguard funds,
22 okay?

23 A. Okay.

24 Q. And considering the fact that the Retirement Committee was
25 routinely considering only American Century funds, other than

1 those Vanguard funds, don't you think it would have been
2 prudent to obtain the impartial guidance of a disinterested
3 outside advisor?

4 A. No.

5 Q. Did you -- you came on board in 2014. Did you know about
6 the Hewitt report that was produced in 2010?

7 A. Not at the time I came on.

8 Q. Now, what time did you learn about the Hewitt report?

9 A. When this litigation started.

10 Q. Now, we've heard a lot of testimony about the participants
11 being -- in your Plan being more sophisticated investors. And
12 I believe you said the same thing on Friday; is that right?

13 A. Correct.

14 Q. And one of the reasons why the Retirement Committee had
15 the number of investment options that it did in the lineup was
16 because of this belief that the participants were more
17 sophisticated, correct?

18 A. We had an appropriate number of investments commensurate
19 with our population, correct.

20 Q. Okay. And one of the reasons the Committee thought that
21 it was the appropriate number was because of the
22 sophistication level of the participants?

23 A. Many of the participants are sophisticated.

24 Q. Okay. And one of the reasons the Retirement Committee had
25 specialty funds and specter -- or, excuse me, sector funds was

1 because of the Committee's belief that the participants were
2 more sophisticated than the typical participant, correct?

3 A. To the extent that we had specialty or sector funds, that
4 is correct.

5 Q. Okay. And I believe it was Ms. Smith who testified very
6 adamantly that the participants were not confused. Do you
7 agree with her?

8 A. I think generally, the participants are not confused. You
9 can always find a population with some level of confusion,
10 which is why we're doing a re-enrollment.

11 THE COURT: Which is why we're going to what?

12 THE WITNESS: Why we're doing that investment
13 re-enrollment.

14 THE COURT: Sure.

15 Q. Okay. But it is important to the Retirement Committee to
16 respect the participants' choices and not be paternalistic?

17 A. We would absolutely respect their choices, correct.

18 Q. And the Retirement Committee also had concerns about being
19 disruptive, such as making too many changes to the lineup; is
20 that right?

21 A. That is correct. We -- we monitor all Plan changes to the
22 investment lineup and other -- otherwise.

23 Q. Okay. And so it's March of 2018, you mentioned the
24 re-enrollment. As a result of that re-enrollment, all
25 participants will automatically be enrolled in an American

1 Century TDF unless they opted out within -- unless they opt
2 out within 30 days. Is that my understanding?

3 A. That's correct.

4 Q. And has that happened yet?

5 A. It is the window -- the 30-day window is going on as we
6 speak.

7 Q. Okay. And this is true, this -- this moving, mapping
8 people from what they're already in to a -- a TDF, this
9 happens to -- this will happen if they don't opt out to
10 current employees, correct?

11 A. Correct.

12 Q. It will happen to past employees who are still in the
13 Plan?

14 A. Correct.

15 Q. It will even happen to relatively new participants, people
16 that have just enrolled, correct?

17 A. Correct.

18 Q. And there's no limit as to when they made their last
19 selections? In other words, if somebody made a selection in
20 the last six months or a year, they're not excluded from this
21 re-enrollment, correct?

22 A. Correct.

23 Q. And, in fact, even people who have a scheduled
24 reallocation of their lineup are also included in this
25 re-enrollment program, correct?

1 A. Correct.

2 Q. That means that people have a plan and they have a set
3 plan where every so often they go in, look at their stuff, and
4 reallocate, even those people are part of this reallocation,
5 correct?

6 A. They may have made that -- that's correct. But they may
7 have made that decision years ago.

8 Q. Right. But they have a planned reallocation. In other
9 words, they're going to sit -- they're planning to sit down
10 and look, right?

11 A. They set up a reallocation, that's correct.

12 Q. Okay. So in order to keep their existing investment
13 elections that they chose, they have to affirmatively opt out,
14 right?

15 A. Correct.

16 Q. And they have 30 days to do so. Was the Committee told
17 what to expect with respect to an opt out rate?

18 A. Yes.

19 Q. What was the Committee told with respect to what they
20 could expect with respect to response in a 30-day period?

21 A. By the way, I've done this hundreds of times with my
22 clients, so I -- I know what the opt out rates are. We will
23 be lower than average. So an average opt out rate would be
24 about 70 -- 70 percent of the participants won't make a
25 decision, so 30 percent will opt out. I would guess 40 to

1 50 -- we were told, and I would agree, 40 to 50 percent of the
2 participants will opt out, higher, more sophisticated
3 population.

4 Q. Okay. So somewhere between 60 and 40 percent or 60 and 50
5 percent will be automatically moved into this TD -- into these
6 TDFs, correct?

7 A. That is correct.

8 Q. How many former employees are in the Plan, currently?

9 A. I do not have the demographic data with me.

10 Q. Is it about -- how many participants are in the Plan?

11 A. There's 1,200 employees. I don't know. I would guess
12 there's probably -- I don't know. 1,500 to 2,000 would be my
13 estimate.

14 Q. And the -- with respect to the notice of this 30-day
15 window, current employees get email, but former employers
16 [sic] get regular mail, correct?

17 A. The web- -- that's correct. The website at Schwab
18 notifies them as well.

19 Q. In fact, you had a presentation from Schwab on this
20 reallocation issue, correct?

21 A. Correct.

22 Q. Let's go to that. Let's go to DX 514, page 11. I believe
23 Mr. Fleckner showed you some pages from this document on
24 Friday.

25 And this is the cover page of that presentation,

1 correct?

2 A. From 2015, that's correct.

3 Q. Okay. Let's go to page 19. I have a quick question there
4 before I double back and ask some questions on the other
5 pages.

6 I was curious about this participant impact thing
7 where it talks about 85 percent. Do you know what that means?
8 It says, Participant impact - 85 percent (1,000 plus 'core'
9 participants) reenrolled remain in default.

10 Do you know what that means?

11 A. I do not know specifically where -- what those numbers
12 are. It's -- it's not our Plan.

13 Q. Okay. Well, that's why -- I couldn't figure out either.
14 That's why I was asking. So let's go back to page 15 of this
15 document. And this is the scatter chart that I believe you
16 and Mr. Fleckner looked at.

17 And as I understand your testimony, what this
18 document reflects is that too many -- too much of the
19 participants' assets, or at least in the Committee's belief,
20 is in equity or stock; is that right?

21 MR. FLECKNER: Objection.

22 THE COURT: Well, you said too much.

23 MR. LUKAS: Well --

24 THE COURT: Would suggest that maybe that's a
25 critical thing. He said that -- I think his earlier testimony

1 was, it appears that a lot of our participants are interested
2 in equity-type allocations, right? That's what he testified
3 to, right?

4 MR. LUKAS: Right. And my question is, it's -- it's
5 in part because of this concern -- that this is actually a
6 concern.

7 THE COURT: Okay.

8 Q. And one of the reasons why they're doing the
9 re-enrollment, correct?

10 THE COURT: So let me make sure. You used -- you
11 used the phrase "too much." Is that too much allocation to
12 equity?

13 THE WITNESS: What we -- let me try to see if I can
14 answer this. What we care about, which is what I stated on
15 Friday, is --

16 THE COURT: And did you say it was too much on
17 Friday?

18 THE WITNESS: No. There -- we look at two extremes.
19 So if you -- if you look at the top right, up here, and if you
20 look down here, what we're trying to solve for primarily --

21 THE COURT: This is an example of someone who's been
22 on the witness stand too long. They understand our technology
23 already.

24 THE WITNESS: I don't know how to clear it.

25 THE COURT: You're the first guy who's really

1 taken -- okay. Go ahead.

2 THE WITNESS: So the people on the bottom left are
3 young. So you're -- you've got a long time horizon for
4 retirement. So what we care about are the people that are at
5 low equity because they don't have enough risk on the table
6 for the time horizon that they have. The people on the top
7 right are older, and they're -- if they're high in equity,
8 they're -- they're too close to the end for the amount of risk
9 they're putting on the table.

10 So primarily -- and the glide path is this. So
11 primarily, what we're trying to solve for are the people on
12 the top right and people on the bottom left. But it solves
13 for everybody as well.

14 THE COURT: So if the glide path is -- is what you
15 pointed out, everybody above that glide path has got to
16 allocate -- they're allocated to too much equity then, right?

17 THE WITNESS: In general, they're allocated to too
18 much equity. But if you're farther to the left, you have more
19 time, and you may have made a philosophical decision that
20 you're okay with the risk because your time horizon is still
21 pretty -- pretty long.

22 THE COURT: Or I may have other investments out
23 there that you don't know about?

24 THE WITNESS: Correct, correct.

25 THE COURT: That doesn't -- this only considers what

1 was done at American Century?

2 THE WITNESS: It does.

3 THE COURT: Okay.

4 THE WITNESS: It does. And so what I -- I mentioned
5 that I had seen hundreds of these scatter graphs. And what
6 you find is there are dots everywhere. But the dots that we
7 tend to fix are the people that are younger, under -- under
8 equity allocated or older, over equity allocated, and we're
9 trying to just have them reset their expectations. They can
10 stay there, we just want them to question it.

11 THE COURT: I think you make a good point,
12 Mr. Lukas. I apologize for -- but I didn't remember too much,
13 but I understand what you're saying. You've studied this more
14 than I have. So I apologize.

15 MR. LUKAS: Yeah.

16 Q. So you're putting -- you're going to basically move 50 to
17 60 percent of the group because you're worried about these two
18 circles?

19 A. No. Again, participants tend to not assess their
20 investment allocations decisions very often. You know, by the
21 way, a high percentage of participants in any plan are
22 defaulted. So our -- all -- our only ask -- and, quite
23 honestly, this is encouraged by regulators and legislatures,
24 is to have people reassess their decisions. That's what this
25 effort does for everybody. If they want to stay, they stay.

1 THE COURT: And you think -- I think that's a very
2 true statement. People don't pay attention to these things.
3 So -- and you -- you believe they should do that on an annual
4 basis, reallocate risk and consider where they're at?

5 THE WITNESS: They should, but they won't. People
6 that are doing what we're describing here, this re-enrollment,
7 academia would say actually behavioral, that you should do
8 this every three years. This is our first time for ever doing
9 it.

10 THE COURT: Okay.

11 THE WITNESS: I joined the Plan in 2014. I've never
12 made an investment election change, and that's what I do. I'm
13 a typical participant.

14 THE COURT: But you're a TDF guy?

15 THE WITNESS: I am, so I don't have to worry about
16 it.

17 THE COURT: Okay. Very good.

18 Q. Right. And there's 50 or 60 percent that's going to be
19 moved to TDF. And you just told the judge, they tend to stay.
20 So when you move these people to the TDFs, the choices they
21 previously made are gone, and they're going to be -- they're
22 going to be in an American Century TDF, correct?

23 A. If they don't opt out.

24 Q. So -- so earlier -- I should probably clear my question
25 for the record. Last time when I said "these two circles," I

1 was talking about that bottom left that you talked about and
2 the upper right you talked about.

3 How about this -- this large mass here in the middle
4 top part, did that large mass have any impact on the
5 Committee's decision to do this reallocation?

6 A. We think everybody in the Plan should be rechecking their
7 allocation decisions periodically, yes. We care about
8 everybody equally.

9 Q. Okay. Let's go to the next page, page 16. And this is
10 information with respect to how many participants hold funds
11 in different categories, correct? Or asset categories I
12 should say, correct?

13 A. Correct.

14 Q. And was there anything about the information on this page
15 that impacted the Committee's decision to do the
16 re-enrollment?

17 A. These numbers by themselves don't tell an amazing story
18 one way or the other in that, generally, people are trained
19 that more diverse -- diversification is better. If you're in
20 all fixed income or all equities, this doesn't -- this doesn't
21 tell me enough.

22 Q. Okay. So the answer to my question is did this or did
23 this not impact the Retirement Committee's decision?

24 A. It was a data input. I don't think this drove our
25 decision.

1 Q. Okay. Thanks.

2 Let's go to the next page and look at four other
3 items that they give you. They talk about core investment
4 behaviors, and they identify four different things that they
5 found in -- in your plan. And I'm going to ask you the same
6 question about these four categories. The first is
7 participants with three or less asset categories. Did that
8 drive or impact the decision at all by the Retirement
9 Committee to do this re-enrollment?

10 A. It would have had an impact. I think it's very important
11 to me to say this is 2015 data. We are doing this in 2018.
12 This is not representative of what we're looking at today.

13 Q. Well, I -- I thought in the 2018 minutes it said that not
14 much had changed from the information that had been obtained
15 in 2015. Isn't that true?

16 A. We look at it every quarter.

17 Q. Okay. And not much had changed since this information was
18 given, correct?

19 A. Generalizations.

20 Q. So how about the second category, age 48 -- or 46 or
21 older, holding less than 10 percent in fixed income or money
22 market, did that impact the Committee's decision to do the
23 re-enrollment?

24 A. That would -- it had input.

25 Q. Okay. And it would be -- same would be true for the next

1 two categories as well?

2 A. It had input.

3 Q. Okay. And then on the next page, page 18, there's some
4 information about age-based investor behaviors. Did these two
5 factors impact the Retirement Committee's decision?

6 A. Absolutely. I have -- I have an issue with this behavior.

7 Q. Excuse me?

8 A. I have an issue with this behavior. We talked about this
9 on Friday, participants in multiple target date funds that are
10 not aligned.

11 Q. Right. Was there any discussion -- we can go off that
12 document. Was there any discussion about any of these
13 concerns -- or, I'm sorry. Was there any discussion about any
14 of these concerns that were being raised were actually being
15 caused by the core lineup itself or what the Retirement
16 Committee was offering in the core lineup?

17 MR. FLECKNER: Objection. I don't know that
18 anyone's considered these concerns.

19 THE COURT: Yeah.

20 MR. LUKAS: I don't know what else to call them. He
21 said the things that impacted the decision.

22 THE COURT: This information, did it cause you to
23 reevaluate the core lineup based on this information?

24 THE WITNESS: The core lineup did not impact our
25 decision.

1 Q. My question was a little different. Did you consider
2 whether or not what was in the core lineup was driving some of
3 these behaviors?

4 A. I've seen 200 of these. This population behavior is very
5 similar to every one I ever see. There is mis-utilization of
6 funds in every of the 200 clients I've seen this of.

7 Q. But my question is a little different. There wasn't any
8 discussion about whether or not the lineup was driving any of
9 those behaviors?

10 A. We did not believe the lineup was driving the behaviors.

11 Q. Well, you say --

12 A. There was a discussion.

13 Q. I'm sorry. What did you say at the last part? I missed
14 that.

15 A. There was a discussion.

16 Q. There was a discussion about whether the lineup was
17 driving some of these behaviors?

18 A. There was a holistic discussion about the -- what was
19 causing the behaviors.

20 Q. Now, on Friday, I believe your testimony with respect to
21 the Vanguard Index Funds was that there's not one Vanguard
22 fund that has more than 1 percent of the Plan's assets. And I
23 think you double backed a little and said there might be one
24 that's right around 1 percent. Do you remember that
25 testimony?

1 A. I don't have the data, but, generally, that sounds
2 correct.

3 Q. Okay. Let's go to -- yeah, this is a demonstrative
4 exhibit that we shared with defendants. Now, the next chart
5 I'll show you is the fancy one with the lines that you like,
6 Judge. But this one, we broke down the assets from Exhibit A.
7 That's that stipulation, Your Honor.

8 And this shows, Mr. Cowherd, that the Vanguard 500
9 Index indeed has almost two and a half percent of the assets
10 in the Plan. Does this refresh your recollection with respect
11 to how many -- or how popular with respect to assets are in
12 the Plan?

13 A. I -- I see that there was one that is above 1 percent.

14 Q. Uh-huh. And, in fact, that one is already 15th most
15 popular out of 40 funds available in the lineup currently; is
16 that right?

17 A. I don't have that data.

18 Q. Uh-huh. And this is in just two years, right?

19 A. Approximately two years.

20 Q. Right. And these funds started from scratch. These funds
21 started with zero dollars two years ago, right?

22 A. They started with zero dollars.

23 Q. Okay. And then we have the other chart. I think we have
24 an exhibit number on it. The ones with the lines we flattened
25 out.

1 This one the Court has seen, but I'm going to show
2 it to you, Mr. Cowherd. And this one's talking about
3 elections, not assets, but how many people live who are
4 putting money in now are electing Vanguard Index Funds. And
5 it shows that four of the funds are above the median with
6 respect to elections. And does that accurately describe what
7 your belief is today?

8 A. I've not seen this chart before.

9 Q. Okay. Do you have any reason to dispute that four of the
10 five index funds are currently elected more than the median
11 fund or, in other words, the middle fund?

12 A. I couldn't comment.

13 Q. Okay. Then you don't -- don't know whether or not the
14 Vanguard 500 Index Fund is currently the third most popular
15 one being elected, correct?

16 A. I do not know that.

17 Q. And this -- these people that have selected these index
18 funds, both asset-wise and the number of people doing it, that
19 is going to be disturbed by this re-enrollment, correct?

20 A. They can opt out.

21 Q. Yeah, they have -- but if they don't opt out in 30 days,
22 they're going to be pulled out of these index funds, the only
23 nonproprietary funds in the lineup, and they'll be put into an
24 American Century TDF, correct?

25 A. Correct.

1 THE COURT: But they'll be pulled out of all the
2 American Century funds too, right?

3 THE WITNESS: It's all the same. It's all the same.
4 Yes.

5 THE COURT: Okay. So we're clear, it's not just
6 going to be affecting the Vanguard funds, it's every fund on
7 the list, right?

8 THE WITNESS: Every fund on the list.

9 THE COURT: All right.

10 Q. Right. The only difference is, participants specifically
11 picked this nonproprietary fund, and now they're being put
12 into a proprietary fund, correct?

13 A. If they pick the American Century funds, I don't see the
14 difference.

15 THE COURT: Yeah. We've got to move down the road
16 from this. This is not going to get us out of here before
17 next -- next spring.

18 MR. LUKAS: Okay. I'll move on, Judge. I'll move
19 on to the -- I'll move on to the next topic, Your Honor.

20 THE COURT: All right.

21 MR. LUKAS: In fact, this is my -- I only have two
22 more topics, Judge.

23 THE COURT: All right.

24 Q. Index funds. I believe -- you testified to Morningstar
25 bubble charts, do you remember? Let's show 43, JX 43, page

1 34, just to make sure we're -- we know what we're talking
2 about.

3 These bubble charts that you folks look at and
4 that -- that Mr. Fleckner showed you on Friday, right?

5 A. Correct.

6 Q. And this is driven by Morningstar data, correct?

7 A. Correct.

8 Q. And you also -- the Retirement Committee also relies on
9 Morningstar data with respect to the expense ratio peer
10 universe that you use, also, correct?

11 A. Correct.

12 Q. And I believe Mr. Bouffard and Ms. Morrison and others
13 discussed Morningstar as well. So I take it Morningstar is a
14 trusted source for you and the Retirement Committee. Would
15 that be a fair statement?

16 A. It is one of the sources that we use.

17 Q. Okay. And do you recall testifying to the long-term
18 virtues of active management versus index funds on Friday?

19 A. I believe there are benefits to active management.

20 Q. Uh-huh. And do you recall testifying as to active
21 management historically will perform better or predicting will
22 historically perform better, particularly -- or historically
23 will perform better particularly in a down market? Do you
24 remember that?

25 A. Active management shows its stripes during volatility and

1 down markets, correct.

2 Q. Now, Mr. Cowherd, I'm showing you a document that's called
3 Morningstar's Active/Passive Barometer from August 2018. Do
4 you see that?

5 A. I do.

6 Q. And in the executive summary, they describe what this is.
7 This says, The Morningstar Active/Passive Barometer is a
8 semiannual report that measures the performance of U.S. active
9 funds against passive peers in their respective Morningstar
10 categories.

11 Do you see that?

12 A. I do.

13 Q. And I'd like you to go to the key takeaways on the second
14 page, at the bottom. There's three takeaways that I want to
15 talk to you about. These three down here, Karla, if you could
16 blow those up.

17 In general, actively managed funds have failed to
18 survive and beat their benchmarks, especially over longer time
19 horizons.

20 The second one. The average dollar in passively
21 managed funds has tended to outperform the average dollar
22 invested in actively managed funds. With that said, there are
23 important exceptions. Over longer time frames, investors in
24 actively managed foreign stock funds have generally
25 outperformed those in passive funds, as evidenced by their

1 higher asset weighed returns.

2 And there -- of the five Vanguard Index Funds that
3 are in the Plan, one of those is a foreign one, correct? A
4 foreign --

5 A. There is a foreign equity.

6 Q. Right. One of the five, correct?

7 A. (Witness nodded head affirmatively.)

8 Q. Okay. And then the last one -- oops. Sorry about that.

9 Investors would greatly improve their odds of
10 success by favoring low cost funds which succeeded far more
11 often than high cost funds over the long term.

12 And then I want to show you the actual chart of what
13 percentage of -- this is on page 4, the top chart. If you
14 could blow this up.

15 This is what percentage of active funds actually
16 outperformed index funds over certain time horizons. And I'll
17 talk to you about these four because I know these are in the
18 Plan. U.S. Large Blend in the three-year category, only 17
19 percent of active funds outperformed index funds. Do you see
20 that?

21 A. I do.

22 Q. And then the rest of the numbers, only 20 percent in 5
23 year, 10 percent in 10, 15 percent in 15, and only 16 percent
24 of the time or 17 percent of the time in a 20-year horizon do
25 actively managed funds outperform index funds. Do you see

1 that?

2 A. What column are you looking at?

3 Q. This one right here.

4 A. Okay. Yes.

5 Q. Okay. And I'm not going to bore the Court with going
6 through these lines. And they speak for themselves. U.S. Mid
7 Blend, same thing, over the 20-year horizon is 9 percent.

8 Only 9 percent of the time does active fund outperform index.

9 U.S. Small Blend, over 20 years, 31 percent. 31.5. And then
10 foreign is 33.3. But I think they mention something about
11 foreign doing better, and that must be this 92.9 with respect
12 to the Foreign Small/Mid-Blend. Do you see that?

13 A. I do.

14 Q. But the rest of these numbers, through U.S. Mid Blend,
15 U.S. Small Blend, are all significantly -- all under 25
16 percent of the time -- more than 25 percent of the time in all
17 of those categories, the index fund in each of those year
18 horizons outperforms the active funds, correct? That's what
19 Morningstar is saying last month, right?

20 A. This would be one of 50 reports I would read. This would
21 not sway me. By the way, we're coming off a 10-year bull
22 market. All of these numbers are skewed based upon what the
23 markets are doing.

24 Q. Well, wait a minute. We have a 20-year time horizon here.

25 A. You've got the longest bull market in the history of the

1 United States in that 20 years. I mean --

2 THE COURT: Okay. So here's what we're going to do.

3 The question is do you -- do you agree with this?

4 THE WITNESS: I do not completely agree with this
5 data.

6 THE COURT: Okay. Ask your next question.

7 MR. LUKAS: I move for the admission of the
8 Morningstar Active/Passive Barometer. It would be PX 494.

9 MR. FLECKNER: Objection.

10 THE COURT: What's your basis?

11 MR. FLECKNER: I mean, this is just impeachment
12 material. I don't know that this is evidence. I don't
13 think they've laid a foundation --

14 THE REPORTER: Excuse me.

15 MR. FLECKNER: Yeah. I'm sorry, Reggie. This is
16 just impeachment material. I don't think this has been
17 established as evidence.

18 THE COURT: Sustained.

19 Q. You also testified on Friday with respect to index funds
20 were something that's -- I believe the phrase was it's
21 something that's hot and in vogue. Do you remember that
22 testimony?

23 A. The trend in the bull market is to index, yes.

24 Q. And I believe you had expressed a concern about people
25 tending to chase what's hot or what's in vogue. Do you

1 remember that?

2 A. Correct.

3 Q. Let's go to JX 10 at page 18. This is a document produced
4 by Hewitt for your Committee eight years ago. And eight years
5 ago, Hewitt was telling your Committee that 95 -- 97 percent
6 of plans had at least the large cap equity index fund. Do you
7 see that?

8 MR. FLECKNER: Objection.

9 A. I see that.

10 THE COURT: Hold on.

11 MR. FLECKNER: This is four years before he joined
12 the Committee.

13 THE COURT: Well, I'm going to let him ask if this
14 witness knows so --

15 A. I see that.

16 Q. Okay. And they talk about 42 percent for Intermediate
17 Bond, 32 for Premixed, 37 for Mid-Cap, 35 for Small-Cap, and
18 34 for International Equity. Do you see that?

19 A. I see that.

20 Q. Does that seem to indicate that 2018 suddenly something is
21 new and hot and in vogue?

22 A. There's two flaws in your logic. One is it's eight years
23 old. And, two, because I know this, Hewitt administers
24 Fortune 500 plans. So we're talking about GE, American
25 Airlines, jumbo plans. I know what their client base looks

1 like. It's different than ours.

2 Q. And we're talking about plans that have more than \$250
3 million in them, right?

4 A. It's -- it's fine. This is not relevant information.

5 Q. Okay. Last thing. I want to go through two funds with
6 you. First, I want to go through International Discovery with
7 you. If you could turn to JX 46 at page 36.

8 And this is that 2016 materials that Mr. Fleckner
9 was taking you through, so the judge has a frame. This is
10 gross returns from September 2016. Let's take a look at
11 International Discovery, which is down here. I don't think
12 you should try to flag it because I'm going to need these
13 three-year and five-year scenarios. Unless you can do it
14 split. Yeah. Check out. Oh, yeah. That -- that would be
15 good. Okay.

16 So let's look at International Discovery. It looks
17 like it beat the benchmark -- and I'm looking here. It beat
18 the benchmark in the three-year, five-year, ten-year, and
19 since inception category, right?

20 MR. FLECKNER: I'll just note the record, I didn't
21 take the witness through this document. I don't have any
22 objection to him using it, I just --

23 THE COURT: All right. Thank you.

24 A. I see the dots that you are showing me have excess return.

25 Q. Right. And so they beat the benchmark in three, five, ten

1 and since its inception. They also have a positive
2 information ratio for the three, five, ten and since
3 inception, correct?

4 A. They do.

5 Q. Excellent performance, wouldn't you say?

6 A. The numbers are what you said.

7 Q. Okay. And let's see if this was a flash in the pan. This
8 is 2016. Let's go to 2010. Let's go back to 2016. If we can
9 go to JX 6 at page 30. And here, it's in the middle here. So
10 we can maybe cheat a little bit. Perfect.

11 Here we see the same thing. We see -- this is back
12 in 2010, and the three year -- well, the three year was rough
13 for every one, but they still outperformed the benchmark. And
14 they outperformed the benchmark in the three, five, ten and
15 since inception categories, correct?

16 A. Correct.

17 Q. And inception was 1994, according to this document,
18 correct?

19 A. Correct.

20 Q. And same here with respect to information ratios, very
21 positive information ratios for the three, five, and 10 years,
22 correct?

23 A. Correct.

24 Q. And this fund, this International Discovery was never on
25 the Watch List. Actually, I'll just represent to the Court

1 that it was never on the Watch List based on PX 477. In fact,
2 it was never close to being on the Watch List while you've
3 been on the Committee, correct?

4 A. I don't have that data in front of me.

5 Q. Okay. And you -- do you know that Dr. Pomerantz -- that
6 there are no damages tied to this fund in any of the four
7 models that Dr. Pomerantz has put forward?

8 MR. FLECKNER: Objection.

9 THE COURT: Well, do you know about the damages?

10 THE WITNESS: I don't know the -- no, I don't.

11 THE COURT: Okay. Sustained.

12 Q. Okay. Let's go to 46. JX 46, at 87.

13 A. By the way, you're showing investor share class. We're
14 not an investor share class, so you've got to make sure you
15 have the right share class.

16 Q. Uh-huh. Did they -- did they perform poorly in the -- in
17 the --

18 A. No. I just --

19 Q. Okay.

20 A. You're just grabbing data that's not representative of
21 what's going on.

22 THE COURT: Would it be a difference in how they
23 perform if you had -- if he had showed you the R6 or
24 institutional class? Would it be --

25 THE WITNESS: They're in a CI- -- it's a CIT.

1 THE COURT: A CIT?

2 THE WITNESS: Yeah.

3 THE COURT: Would it be different?

4 THE WITNESS: Performance would be moderately
5 different, but not significantly.

6 THE COURT: Would it be better or worse?

7 THE WITNESS: Generally, if fees are lower, the
8 performance will be a little bit better.

9 THE COURT: Okay.

10 Q. Right. So it would be even better if I had showed you the
11 right share class, right?

12 A. Probably.

13 Q. And that was the share class it was in in 2010, though.
14 We were showing you 2010.

15 A. I wasn't here.

16 MR. FLECKNER: Objection. Foundation.

17 MR. LUKAS: Okay. Okay.

18 THE COURT: Okay.

19 Q. But nothing that would take away from how outstanding that
20 particular fund has been over the course of over a decade,
21 correct?

22 A. You picked a really good fund when you picked the fund.

23 Q. Yeah. And --

24 THE COURT: Are you in that fund, Mr. Lukas?

25 Q. So then when we go to this chart and we look at that box

1 that has Growth, Mid Growth, International Equity, and we see
2 Discovery there, what we know is that the Retirement Committee
3 has found a fund for that category that has consistently
4 performed well for over a decade, correct?

5 A. It's a good fund.

6 Q. Yeah. And, in fact, we could do that with each of these
7 boxes and find a fund just as good as this one if we went
8 outside of American Century; isn't that true?

9 A. No. You could -- we can find the top performing fund and
10 chase that, if that's what you want us to do. By the way, I
11 thought I said you wanted us to index -- didn't you say a
12 little while ago --

13 THE COURT: Hold on. Hold on. Hold on.

14 Mr. Cowherd --

15 THE WITNESS: I'm sorry.

16 THE COURT: I've been fussing at him about arguing
17 with witnesses.

18 THE WITNESS: Yeah, I won't argue back.

19 THE COURT: I can't let witnesses argue with
20 attorneys either.

21 THE WITNESS: Okay. Okay. I won't.

22 THE COURT: But I understand.

23 THE WITNESS: I apologize.

24 THE COURT: You have passion about this, and that's
25 great.

1 THE WITNESS: Okay.

2 THE COURT: But try to listen to the question and
3 respond to the question.

4 THE WITNESS: I will. Sorry, Your Honor.

5 THE COURT: You're fine.

6 Q. But you could go on the open market and -- and find a fund
7 that performs this good for this long and this consistently in
8 every one of these boxes, couldn't you?

9 A. It's impossible to predict that.

10 Q. Are you saying that the Retirement Committee is chasing
11 performance when it left Discovery -- this Discovery Fund in
12 the lineup for all these years over a decade?

13 A. It didn't go on -- we had it in the Plan. It didn't go on
14 a Watch List.

15 Q. Okay. Let's do the flip side. Let's look at the
16 International Bond Fund. Let's go to JX 46 at page 38.
17 International Bond is way on the bottom, but you can still
18 blow us up a little bit.

19 This is the September 2016 gross returns.

20 International Bond, three year, five year, ten year, since
21 inception, below the benchmark, correct?

22 A. That's what those numbers show.

23 Q. Yep. And these numbers also show an information ratio,
24 below -- in a negative for three, five, ten, and since
25 inception. Do you see that?

1 A. I see that.

2 Q. Okay. And let's see if this is a flash in the pan, maybe
3 just a short-term thing. Let's go to 2010. Which is JX 6,
4 page 33. Yeah, it's right on top, so we've got to --

5 This is May 2010, gross returns. And gross return
6 again means that the actual fee that was charged isn't part of
7 this consideration; is that right?

8 A. Pardon me? Can you say it again?

9 Q. Sure. Gross returns means that the fee that was actually
10 paid for the fund isn't considered in this information?

11 MR. FLECKNER: Objection, foundation. It's four
12 years before he joined the Committee.

13 THE COURT: Well, I mean, he knows what gross return
14 is.

15 MR. LUKAS: Yeah, we know.

16 THE COURT: And we've -- my goodness, we've talked
17 about gross returns for how many days now we've been doing
18 this?

19 MR. LUKAS: This is day nine.

20 THE COURT: Day nine -- nine days. So you -- even
21 you have educated the judge here.

22 MR. LUKAS: Okay. Well, I'll move on.

23 THE COURT: I understand.

24 MR. LUKAS: I'll move on --

25 THE COURT: That's fine.

1 MR. LUKAS: -- because you're right, it really
2 doesn't matter.

3 Q. What matters is back in 2010, we see the same thing.
4 Three year, five year, ten year, since inception,
5 underperforming the benchmark, correct?

6 A. That's what it says.

7 Q. And same with information ratio, three year, five year,
8 ten year, under a negative information ratio, correct?

9 A. Correct.

10 Q. And this one did make the Watch List, but it took -- this
11 is 2010 with those numbers. It took until twenty four -- 2014
12 to be in the bottom quartile for the three and one year. So
13 these information ratios weren't bad enough until 2014 for it
14 to be on the Watch List; is that right?

15 MR. FLECKNER: Foundation.

16 A. I wasn't --

17 THE COURT: Overruled.

18 A. I don't have that history.

19 Q. Okay. Well, PX 477 shows that it went on the Watch List
20 in 2014. So that's the year you joined the Committee, 2014,
21 right?

22 A. Late 2014.

23 Q. Uh-huh. And it remains on the Watch List today; is that
24 correct? Four years. It's on its fourth year on the Watch
25 List.

1 A. We talk about it, correct.

2 Q. And you've talked about it for four years, right?

3 A. We use broader information than what you're representing
4 here.

5 Q. Okay. What I'm representing here is from the Retirement
6 Committee's materials.

7 THE COURT: I know. But he said he's looked at this
8 and he says --

9 MR. LUKAS: Okay.

10 THE COURT: -- they've used broader information.
11 We're going to let him say that.

12 MR. LUKAS: Okay.

13 Q. And you would not be surprised that this particular fund
14 generates a damage in all four of Dr. Pomerantz's models,
15 would you?

16 A. I have no idea.

17 MR. FLECKNER: Objection.

18 THE COURT: Sustained. Let me clear this up.

19 THE WITNESS: Okay.

20 THE COURT: Have you reviewed Dr. Pomerantz's
21 models?

22 THE WITNESS: I have not.

23 THE COURT: So no further questions about
24 Dr. Pomerantz's models if this witness hasn't seen it. I
25 think the first question of the witnesses that follow should

1 be, have you reviewed Dr. Pomerantz's models? And then you
2 can ask questions.

3 MR. LUKAS: Okay.

4 THE COURT: But please don't ask any other questions
5 about his models with this witness. Thank you.

6 MR. LUKAS: Fair enough, Your Honor.

7 Q. So let's go to the chart again, 46 at page 87. And we're
8 here on this particular box, which is the Mid Cap Long Fixed
9 Income box. Do you see that?

10 A. I do.

11 Q. So the Retirement Committee has had a fund in that
12 particular box that has consistently underperformed the
13 benchmark and has had negative investment ratios for the
14 three, five, and ten-year periods for well over a decade; is
15 that right?

16 A. I -- I don't know.

17 Q. There's been no effort to replace this fund with a fund
18 from the outside marketplace, correct?

19 A. We've evaluated --

20 THE COURT: Hold on. Hold on. This is another
21 question that comes up in about ten different forms. Other
22 than the Vanguard -- Vanguard funds, have there been any
23 effort to replace any of the existing core lineup funds as
24 long as you've been on the Retirement Committee?

25 THE WITNESS: We evaluate them and decide if they

1 should be replaced.

2 THE COURT: Have you considered replacement from
3 outside of the -- the American Century funds?

4 THE WITNESS: If we -- if we --

5 THE COURT: Specifically on any of them?

6 THE WITNESS: If we do not have -- like the
7 Vanguard, if we do not have capacity, if we were to do stable
8 value or something like that where we didn't have capacity, we
9 would -- we would consider that.

10 THE COURT: Okay. So I -- I guess I'm trying to
11 eliminate this question that manifests itself in different
12 forms. If we could, maybe -- maybe find a broader question,
13 because, clearly -- I mean, the evidence has been pretty
14 clear.

15 MR. LUKAS: Yeah. I think so too, and I think Your
16 Honor -- I think Your Honor makes a good point. And I believe
17 his answer to your question is what I was looking for.

18 THE COURT: Okay. Very good.

19 MR. LUKAS: Thank you, Your Honor. No more
20 questions.

21 THE COURT: All right. Mr. Fleckner, sir.

22 MR. FLECKNER: Just a couple quick questions.

23 THE COURT: Yes, sir.

24 MR. FLECKNER: If we could pull up, Nancy, Exhibit
25 PX 476. And maybe -- I don't if I can hand up a copy to

1 Mr. Cowherd. And I don't know if the Court has copies of 476.
2 One for you and one for the judge. If I can approach?

3 THE COURT: Yes, sir.

4 REDIRECT EXAMINATION

5 BY MR. FLECKNER:

6 Q. Mr. Cowherd, you were asked some questions on
7 cross-examination about the current utilization of the
8 Vanguard funds. I'm showing you a document that's been
9 identified PX 476. Are you familiar generally with this
10 document?

11 A. It looks like it's a Schwab report.

12 Q. Okay. And -- and this one purports to show the usage of
13 the funds in the core lineup as of June 30, 2018.

14 MR. FLECKNER: Did we get you a copy?

15 MR. LUKAS: No, you didn't.

16 MR. FLECKNER: All right. So let's pull up -- you
17 can have mine, Paul.

18 Q. If we can pull up the second page, Chris.

19 And I'll direct your attention to the second page of
20 this document. It identifies the utilization of as of June
21 30, 2018, of a number of the funds in the lineup, including
22 some of the Vanguard funds. You'll see the Vanguard 500 Index
23 is identified on the third line, and some of the other
24 Vanguard funds are identified on other lines. If you'd just
25 explain to the Court what does this utilization chart show?

1 A. There's two factors. I can't tell the shading, but one of
2 the factors is the participants with an account balance, and
3 the other factor is the participants that have a feature
4 investment election into that fund.

5 THE COURT: Can you tell which is on top and which
6 is on the bottom? Are balances on top and elections on the
7 bottom? Can we tell that?

8 THE WITNESS: I would -- I cannot tell the shading.

9 THE COURT: Okay.

10 Q. I think it is. And the reason I get there, Your Honor, is
11 because the American Century Company's company stock has
12 only --

13 A. Oh, there we go.

14 Q. -- the top line in balances. And participants cannot
15 elect that.

16 A. That validates it.

17 THE COURT: Thank you, Mr. Fleckner.

18 Q. Okay. And are these data that you review as part of your
19 role as a Committee member?

20 A. This would be the format that we review.

21 Q. Okay. And just looking at this page, does anything about
22 the utilization in terms of balances or elections of the
23 Vanguard fund surprise you in any way?

24 A. No.

25 Q. Does it suggest that these funds are outliers in terms of

1 balances or elections as compared to other funds?

2 A. No.

3 Q. So, for example, you'll see the American Century Emerging
4 Markets Fund has higher balances and higher elections,
5 correct?

6 A. Correct.

7 Q. Okay. You can pull that down, Chris.

8 You were asked questions about re-enrollment. Was
9 the decision to implement re-enrollment designed to force
10 participants out of Vanguard funds?

11 A. Not even considered, no.

12 Q. Was the existence of Vanguard funds a driving factor or
13 any factor in the decision to do re-enrollment?

14 A. Didn't think of them any different than any other
15 investment option.

16 Q. And do you -- have you taken any steps on the Committee to
17 try to steer participants away from use of the Vanguard fund
18 options that you've included while you've been on the
19 Committee?

20 A. Not at all.

21 Q. Okay. And Mr. Lukas finally asked some questions about
22 why -- well, he asked some questions about whether the
23 Committee has investigated alternative funds in some of the
24 different style boxes that he just showed you. Why hasn't the
25 Committee investigated alternatives in some of those -- in

1 those style boxes?

2 A. If -- if the -- if the funds meet the criteria and we have
3 faith in what's going on, we leave them. The last endeavor
4 that we had was two years ago or whenever -- 18 months ago
5 when we eliminated six funds. And that was what we were doing
6 at that time.

7 MR. FLECKNER: Okay. Thank you very much,
8 Mr. Cowherd. I have no further questions.

9 MR. LUKAS: I have nothing further, Your Honor.

10 THE COURT: All right. Thank you, Mr. Cowherd.
11 Have a good day.

12 THE WITNESS: Thank you.

13 THE COURT: Please call your next witness.

14 MR. FALVEY: The defendants call Margaret
15 VanWagoner.

16 THE COURT: Thank you, Ms. VanWagoner. Would you
17 please face our clerk and raise your right hand and be sworn?

18 MARGARET ELIZABETH VANWAGONER, DEFENDANTS' WITNESS, SWEORN

19 THE COURT: And, Ms. VanWagoner, you're probably
20 familiar with the drill by now.

21 THE WITNESS: I just -- I just haven't actively
22 participated yet.

23 THE COURT: And I will -- I'll bet that
24 Ms. Cunningham has provided you the right binder. Yeah.
25 Thank you for pulling that down. And if you'll get close to

1 that for us.

2 THE WITNESS: Okay.

3 THE COURT: And begin, ma'am, by speaking your full
4 name and spelling your last name for us.

5 THE WITNESS: Sure. Margaret Elizabeth VanWagoner,
6 V-A-N-W-A-G-O-N-E-R.

7 THE COURT: Thank you, ma'am.

8 All right. Mr. Falvey, sir.

9 MR. FALVEY: Thank you, Your Honor.

10 DIRECT EXAMINATION

11 BY MR. FALVEY:

12 Q. Good morning, Ms. VanWagoner.

13 A. Good morning.

14 Q. Your name is Margaret, and you go by Peg; is that correct?

15 A. That's correct.

16 Q. We're going to try to talk slowly and go fast this
17 morning.

18 A. Okay.

19 THE COURT: Thank you, Mr. Falvey. I appreciate
20 that.

21 Q. How are you -- thank you, Your Honor.

22 How are you now employed, Ms. VanWagoner?

23 A. I'm a senior consultant at DeMarche Associates.

24 Q. And for how long have you been at DeMarche?

25 A. Since I've been back at DeMarche, it's been four years,

1 just about four years. I worked with them for 14 years right
2 after college.

3 THE COURT: Just so my notes are more accurate,
4 would you spell -- spell DeMarche for me?

5 THE WITNESS: Sure.

6 THE COURT: Yeah.

7 THE WITNESS: D-E-M-A-R-C-H-E.

8 THE COURT: Thank you, ma'am.

9 Q. And what do you do at DeMarche, and what kind of firm is
10 it?

11 A. DeMarche is an institutional investment consulting firm.
12 The work we do is to advise -- and we have a discretionary
13 business, but to advise our institutional clients on behalf of
14 the investment funds that they have fiduciary responsibility
15 for.

16 Q. And are you what's known as a consultant in the Retirement
17 Plan industry?

18 A. Yes.

19 Q. And we heard from Marjorie Morrison earlier. Was Margie
20 Morrison a colleague of yours at DeMarche --

21 A. Yes, she was.

22 Q. -- at a point in time? And then later a colleague at
23 American Century?

24 A. Yes, she was.

25 Q. So when did you come to American Century, Ms. VanWagoner?

1 A. When?

2 Q. When, right.

3 A. I came in February of 2001.

4 Q. And were you there until 2014?

5 A. Yes.

6 Q. In a -- in a sentence, what was your role during the
7 period you were at American Century? And we'll come back to
8 it.

9 A. My role at American Century was as a relationship manager
10 for Plan sponsors. I also had a -- some work that I did with
11 investment consultants during that time, and I managed some of
12 the institutional team for a period of my tenure there.

13 Q. And while at American Century, were you a member of this
14 Retirement Committee that is the subject of this lawsuit?

15 A. Yes.

16 Q. And were you on the Committee from 2008 until you left in
17 2014?

18 A. Yes.

19 Q. Are you a defendant in this case?

20 A. Yes.

21 Q. Have you ever been sued before, Ms. VanWagoner?

22 A. No.

23 Q. Tell us, please, about your educational background.

24 A. My undergraduate degree is from the University of Kansas
25 in business. And my graduate degree is from Rockhurst

1 University. It's an MBA. And then various FINRA testing
2 since then for the certifications that I have.

3 Q. Do you hold securities licenses?

4 A. Yes, I do.

5 Q. And what securities licenses do you hold?

6 A. So the 6, 7, 24, 66.

7 Q. Do they -- sorry.

8 A. 65, I think, yeah.

9 Q. Do they relate generally to this licensure enabling you to
10 sell various types of investment products?

11 A. That is correct.

12 Q. You talked earlier about your time at DeMarche. And what
13 year did you start at DeMarche?

14 A. I started at DeMarche in May of nineteen -- let's see,
15 '84. I think that's right. And -- yes. So that's when I
16 started as a portfolio accountant.

17 Q. Were you at DeMarche for about 14 years?

18 A. I was.

19 Q. Until the late '90s?

20 A. Yes.

21 Q. And trace, if you would, the arc of your experience at
22 DeMarche during those 14 years.

23 A. Sure. So I came to the firm as a portfolio accountant and
24 within months was provided to managing the portfolio
25 accounting department, and then ultimately the operations of

1 the portfolio accounting and report distribution function.
2 Then I became a production assistant working directly with
3 consulting teams.

4 Let's see. After that, I became a -- an account
5 manager type of role, think of it like a junior consultant.
6 And then I moved to the consulting role in 1987, I believe it
7 was. And left the first time after 14 years as a senior
8 consultant working directly with Plan sponsors.

9 Q. And then you would roll back to DeMarche more recently
10 after leaving --

11 A. Yes.

12 Q. -- American Century?

13 A. Yes. I came back at the end of 2014 and have been a
14 senior consultant working with Plan sponsors.

15 Q. And after your first stint at DeMarche ending in 1998, did
16 you then work at another firm in a consulting role before
17 coming to American Century?

18 A. Yes. I worked for Thomson Horstmann & Bryant,
19 T-H-O-M-S-O-N, H-O-R-S-T-M-A-N-N and your standard Bryant,
20 B-R-Y-A-N-T.

21 Q. And were you there for a few years before joining American
22 Century?

23 A. That is correct. And I was in the relationship management
24 consultant relation roles for that firm.

25 Q. All right. So you had about 17 years or so in various

1 consulting capacities at those two firms before coming to
2 American Century?

3 A. That sounds right, yes.

4 Q. Can you describe broadly what you were doing as a
5 consultant to retirement plans during that period?

6 A. Yes. As a consultant, I was working with Plan sponsors to
7 help them with their asset allocation of their funds, the
8 performance measurement of their funds, helping them
9 understand what their managers were doing and why. Also,
10 Investment Policy Statement creation and review. I'm thinking
11 if I'm missing anything there. I think that's pretty much all
12 of it.

13 Q. You mentioned Investment Policy Statements. Did you write
14 IPSs?

15 A. Yes.

16 Q. How many IPSs did you write during your period as a
17 consultant?

18 A. Oh, gosh. More than 10, less than 20. Most of them were
19 already written, so my job was to review and amend.

20 Q. Did you also attend Plan sponsor committee meetings?

21 A. Yes.

22 Q. And these would include sponsor committees for defined
23 contribution plans, like American Century's?

24 A. Yes.

25 Q. How many different -- how many times did you attend 401(k)

1 committee meetings before you joined American Century at the
2 time when you were in a consulting role?

3 A. Probably hundreds.

4 Q. And would you typically tend to provide information and
5 present on a consulting project?

6 A. Yes.

7 Q. What would the give and take be, consist of generally at
8 those sessions that you attended when you were a consultant?

9 A. So outside of the standard reporting of performance in
10 capital markets and the laundry list of regular
11 investment-related activities of the Committee, we would be
12 charged with special projects at times. That could include
13 just about anything, including the review of an asset lineup.
14 We would present the education to the committees, present our
15 recommendations, our suggestions, and -- and then wait for the
16 committee to make a decision as to whether they would accept
17 them or not.

18 Q. We're going to talk relatively briefly about Hewitt a
19 little bit. But were you a counterpart to -- to the Hewitt
20 consulting firm that American Century brought in for a
21 project?

22 A. The HR department actually hired the Hewitt organization,
23 but I was aware of that process.

24 Q. And what I -- what I'm trying to get at is is the
25 consulting role you performed the kind of consulting that

1 Hewitt does all the time?

2 A. Yes. I'm sorry.

3 Q. And back to these sponsor committee meetings you attended
4 for 401(k) plans while a consultant, you said you attended
5 hundreds. Would there be give and take in connection with
6 your -- these sessions?

7 A. Yes. Absolutely.

8 Q. Just describe briefly kind of what that piece of it would
9 consist of.

10 A. So as investment committees do, they would question the --
11 the information. They would ask questions regarding the
12 education materials that were presented. There would be give
13 and take back and forth on what's the next -- next thing to
14 do, what's the next step. So it was -- it was an interactive
15 process.

16 Q. And you engaged in hundreds of those kinds of sessions in
17 your consulting role?

18 A. Yes.

19 Q. So now let's get to American Century. You joined in 2001,
20 correct?

21 A. That is correct.

22 Q. And we haven't done this yet. Describe for the Court what
23 your role was while you were at American Century or what roles
24 you had.

25 A. Okay. So at American Century, I came in as a relationship

1 manager for the institutional business working directly with
2 Plan sponsors. Over the time of my tenure at American
3 Century, I also visited with and had a responsibility for
4 consultant firms to distribute, market, sell to them as well.
5 I had cross-sell responsibilities to the Plan sponsors I
6 worked with on other American Century products.

7 THE COURT: Could you slow down, please?

8 THE WITNESS: Sure.

9 THE COURT: Thank you.

10 THE WITNESS: This is slow.

11 THE COURT: Do your best.

12 THE WITNESS: I will. I will.

13 THE COURT: Thank you.

14 A. And I managed a portion of the institutional team, the
15 relationship management team for a period of time. And all
16 throughout my tenure at American Century, I worked directly
17 with Plan sponsors.

18 Q. So let's pull up DX 842, please, Chris.

19 We've referred to this org chart -- you might have
20 been in the courtroom -- with some other witnesses. This
21 largely portrays the investment division of the firm, but I
22 just wanted to ask you to point out to the Court which --
23 which group you would have been reporting through during your
24 period as a client relationship manager?

25 A. So I would have reported through the chief client officer

1 for sales and distribution.

2 THE COURT: You can touch -- you can touch it if you
3 want to.

4 THE WITNESS: (Indicating.)

5 THE COURT: Okay.

6 Q. So you were somewhere down in this chain, correct?

7 A. Yes. That's correct.

8 Q. Thank you. So -- all right. So just tell us, if you
9 would, the titles that you held along the way. You've sort of
10 described functionally what you did in the -- on the client
11 relationship side.

12 A. So as I -- I was a vice president of the firm as a client
13 relationship manager. And that involved working directly with
14 Plan sponsors and their committees in presenting the work that
15 American Century did for them, whichever investment strategies
16 they were invested in. I also consultatively worked with the
17 main contacts that I had with my clients to understand what
18 they were looking at next and how we might be helpful to them
19 in that endeavor, other investment strategies type thing.

20 Q. And so that was your full-time role during this period
21 that we'll be looking at. And you joined the Retirement
22 Committee in about 2008 and were on it until you left in 2014?

23 A. That is correct.

24 Q. Before I focus now in on the Retirement Committee for the
25 rest of your testimony, I want to just ask, in addition to

1 work, you've also been raising a family, correct?

2 A. That's correct.

3 Q. And have you also found time for charitable and civic
4 work?

5 A. That is correct.

6 Q. And has your charitable and civic work been in the area of
7 being a fiduciary on committees that oversee investment?

8 A. Yes. That is correct.

9 Q. Can you describe the various capacities in which you've
10 served on investment committees as a fiduciary?

11 A. Yes. So for the Women's Foundation here locally, I've
12 been on the investment committee for over 25 years. I chaired
13 that committee for a period of time. I couldn't tell you the
14 years, but way back. And served on the advisory board for
15 that organization. And was its board president for a period
16 of time.

17 Q. What does the investment committee do for that group?

18 A. The investment committee selects the asset allocation, the
19 manager lineup, and then makes decisions on shifts between the
20 different asset categories on a regular basis.

21 Q. Have you served on any other boards?

22 A. Yes. I -- I serve on the board of the Healthcare
23 Foundation of Greater Kansas City. I am also the current
24 chair of the investment committee for that organization and on
25 the executive committee for that organization.

1 Q. What's the -- the Healthcare Foundation of Greater Kansas
2 City?

3 A. It's a -- as it's named -- a healthcare foundation that
4 focuses the assets of the portfolio on granting to the local
5 community and statewide, depending on the programs, for -- at
6 the very high level, generally, the underinsured, medically
7 underinsured or uninsured and related issues surrounding
8 healthy living.

9 Q. And what are the funds that -- that the -- that the
10 foundation has custody of, where do those come from?

11 A. So the assets were a result of the sale of hospital
12 properties in various counties in Kansas and Missouri,
13 including Allen County, Kansas, so one pretty far away from
14 where we are here. So the result of the sale of those
15 properties went into two portfolios and were split by the
16 Attorneys General of Kansas and Missouri into -- 80 percent of
17 those assets going to the Healthcare Foundation and 20 percent
18 of those assets going to the Reach Foundation.

19 Q. How big is the -- is the endowment of this foundation that
20 you -- that you oversee on the Investment Committee?

21 A. Right now, it's around \$770 million.

22 Q. So this is a fund that's considerably larger than the --
23 the 401(k) plan that's the subject of this case, correct?

24 A. Yes.

25 Q. Have you served as the chair of that investment committee?

1 A. Yes.

2 Q. Are you also on its board of directors?

3 A. I am.

4 Q. And you're on the Foundation's board of directors,
5 correct?

6 A. Yes, yes.

7 Q. Are you also on the executive committee of the board of
8 directors of that organization?

9 A. Yes, I am.

10 Q. So you've mentioned a couple of committee involvements
11 that you have on the charitable side. Is there another one
12 that we've not touched on?

13 A. Yes. I -- I just finished my last term, nine years I
14 believe, as an investment committee member of the Diocese of
15 Kansas City and St. Joseph, investments, holistic investments.
16 It's retirement plans as well as operating assets.

17 Q. Let's call up DX 846, please, Chris.

18 So now let's go to your time on the Retirement
19 Committee, Ms. VanWagoner. I just wanted to --

20 A. Can I -- can I add one real quick?

21 Q. Oh, sure.

22 A. I'm also on the advisory board for the School of Social
23 Welfare at the University of Kansas.

24 THE COURT: Thank you.

25 Q. And what does that advisory board do?

1 A. Advises to the school on programs, curriculum, strategic
2 thinking for that particular school at the University of
3 Kansas going forward for both the undergraduate and the
4 graduate programs.

5 Q. And not to load up here, but you're -- at DeMarche, are
6 you also on its investment committee?

7 A. That's correct. I am on the investment -- retirement
8 investment committee for the 401(k) plan at DeMarche.

9 Q. So now I put up on the screen, the -- just pictures and
10 timeline of who sat on this committee. Just to orient
11 yourself and the Court, the Court has met and you've been in
12 the courtroom for testimony of some of the folks on here.

13 But over on the left side, we can see the group that
14 you served with for a majority of your time on the Committee,
15 correct?

16 A. That's correct.

17 Q. They include Chris Bouffard and John Leis and Brad
18 Cloverdyke, right?

19 A. Uh-huh. That's correct.

20 Q. And you remained on while there was some turnover, and you
21 also served with Margie Morrison and Julie Smith, correct?
22 And John Leis more or less throughout?

23 A. That's correct.

24 Q. You can pull that down, Chris. Thank you.

25 So let me ask, with those folks in mind, about the

1 composition of this Committee. You've dealt with lots of
2 committees. What did you -- what did you believe about the --
3 the composition of this Committee and whether it had
4 appropriate representation for running this Plan?

5 A. Sure. I remember coming -- being asked to be on the
6 Committee and learning of those that were participating. I
7 was happy to hear that none of the C-Suite, chief anything,
8 was part of that committee. It was managers and middle
9 managers within the organization representing the various
10 channels but also different expertise as it related to
11 decision making. I saw people representing their employee
12 base as well as the quantitative and qualitative aspects of
13 investment management.

14 Q. And C-Suite is a buzz term that gets used sometimes in
15 corporate America. It refers to what?

16 A. Chief investment officers, presidents of firms, C -- chief
17 financial officers, just the Cs.

18 Q. The chief executive officer, chief legal officer?

19 A. Yeah.

20 Q. The Cs?

21 A. Yeah. The only differences is I think Gudrun became chief
22 of technology at one point, but that was a different -- that
23 was a different --

24 Q. And we haven't met Gudrun. That's Gudrun Neumann, who was
25 chief of technology, top IT person at the firm?

1 A. Yeah.

2 Q. Right?

3 A. That's correct.

4 Q. So did you think it was appropriately composed?

5 A. Yes. Absolutely.

6 Q. When you got on the Committee, did you receive a copy of
7 the Investment Policy Statement?

8 A. Yes.

9 Q. Okay. If we can look at JX 054, Chris, just on its cover
10 page.

11 Did you read the IPS cover to cover?

12 A. Yes.

13 Q. You mentioned you had seen and indeed written many of
14 these, correct?

15 A. That's correct.

16 Q. Did you -- did you reference the Investment Policy
17 Statement during your period on the Committee?

18 A. Yes, I did. I believe I also asked that it be included on
19 a regular basis at some point in all of our materials so that
20 we could refer to it as we needed.

21 Q. So for each meeting, you asked that it actually be in the
22 physical packet that came around --

23 A. Yes.

24 Q. -- just as a handy reference tool while -- while you all
25 discussed the matters on the agenda?

1 THE COURT: Could I stop you for just a minute? Is
2 that showing up on your screen?

3 THE WITNESS: Yes.

4 THE COURT: One moment. Ms. Strodtman, my screen is
5 not working right now. It has been working. So would you let
6 IT know? We're going to take a recess in about 10 minutes.

7 THE COURT CLERK: Uh-huh.

8 THE COURT: All right. Thank you.

9 MR. FALVEY: On this one, I think it won't matter so
10 much, Your Honor.

11 THE COURT: That's fine.

12 Q. You read it carefully?

13 A. Yes.

14 Q. Did the Committee use the various provisions of this
15 carefully as it evaluated and monitored the investments that
16 the -- that were in the Plan?

17 A. Yes. We were very thorough to look back at this document
18 as we were reviewing not only investment performance but any
19 changes to the people or the process involved in those
20 strategies.

21 Q. And you'll recall that there's set forth in the Investment
22 Policy Statement some criteria by which the lineup should be
23 evaluated initially and on an ongoing basis?

24 A. Yes. Absolutely. But also recognize that the document,
25 as it should, allowed the Investment Committee some

1 flexibility within those parameters to make decisions about
2 the lineup.

3 Q. In your experience, did it have the appropriate degree of
4 direction and provide for an appropriate degree of
5 flexibility?

6 A. Yes.

7 Q. Let's -- and let me ask you broadly about the materials
8 that were used for each of the meetings. We're not going to
9 go through them. You received a packet in advance each time,
10 correct?

11 A. We received a packet about a week in advance. I would
12 take 30 to 45 minutes usually about three different times
13 during that week to make sure I went through it. So that was
14 quite a bit of time. But I tried not to digest it all in one
15 fell swoop. And then again briefly before the meeting
16 started.

17 Q. Did you believe you were receiving the appropriate
18 documents each time with respect to analytics on the
19 investments and with respect to Plan utilization by the
20 participants?

21 A. Yes.

22 Q. And in comparison to what you've seen elsewhere, how would
23 you evaluate these materials that you received?

24 A. Well, from what I've seen in other investment committees,
25 this is like in the top 10 percent of -- of not only the

1 timeliness of receiving the documentation, but also the
2 thorough manner in which the information was shared with us
3 prior to the meeting, which made it much more helpful during
4 an investment meeting.

5 Q. I'm going to show you a single page from one of the sets
6 of materials. Chris, could you look at -- or bring up JX 16,
7 page 33, please?

8 This is -- do you recognize this as a report of the
9 fees being charged by funds in the Plan at a certain point in
10 time compared to a -- a median -- sorry, compared to a peer
11 group?

12 A. Yes.

13 Q. Do you recognize it?

14 THE COURT: Hold on just a second. Let me find that
15 again.

16 THE WITNESS: Sure.

17 THE COURT: That was JX 16. Ms. Cunningham was kind
18 enough to provide me a paper copy. She's already gave me
19 probably about four paper copies somewhere in this, but -- so
20 what page were you on again?

21 MR. FALVEY: Page 33, Your Honor.

22 THE COURT: Page 33. Okay.

23 MR. FALVEY: Sorry about that.

24 THE COURT: Thank you.

25 Q. But I'll just ask while --

1 THE COURT: Sure.

2 Q. -- the Court is looking, do you recognize the format?

3 A. I do.

4 Q. Are you familiar with it?

5 A. I am familiar with this.

6 THE COURT: I'm with you.

7 Q. There's been quite a bit of questioning about this report
8 and some reports like it concerning whether the appropriate
9 peer group was being looked at in evaluating the fees of the
10 different funds. You've probably been in the courtroom for
11 some of that?

12 A. Yes.

13 Q. And in your experience, is this the type of comparison
14 data that is typically provided to plan committees?

15 A. Yes.

16 Q. There's been a question about whether, given that the
17 funds were largely institutional class shares at the time,
18 whether the Committee should have had available to it
19 comparison data that looked only at institutional class shares
20 for comparison. Have you heard some of that questioning?

21 A. I have.

22 Q. And in your experience, do retirement investment
23 committees typically have that sort of data available?

24 A. Not back in 2011. This was a very common practice to look
25 at multiple share class shares for different mutual funds as a

1 comparison within a peer group. So back then, it was very,
2 very common. In fact, it's pretty common today to look --
3 look at this the same way.

4 Q. And were you comfortable using this data for comparative
5 purposes at the time?

6 A. Yes.

7 Q. Did you, as part of your -- your day job, your role as a
8 client relationship manager, have experience with how the fees
9 of American Century funds stacked up against the competition
10 in the marketplace?

11 A. Yes.

12 Q. And why would you have had familiar- -- familiarity with
13 that as a client relationship manager?

14 A. I would have been aware of the competitive funds that my
15 client might be using for the various asset classes where they
16 held American Century funds. And at time -- occasionally, we
17 would see the reporting in those investment committees that
18 was related to other peer groups.

19 Q. And what did you know about how American Century funds
20 compared to its competitive funds on a -- on a same class
21 basis? That is, invest -- you know, investment grade to
22 investment grade, institutional share class to institutional
23 share class?

24 A. Yeah. The American Century funds were generally at or
25 below median for the asset categories that I have with

1 clients, so they were competitive from a fee perspective.
2 Now, over time fees changed as the market evolved. So fees
3 would come down on the various assets as well. And then
4 there's obviously different share classes that have taken the
5 fee equation out of it.

6 Q. So we can take that down, Chris.

7 Let's -- before we break, let me just ask you
8 briefly about discussion at the meetings and discussion
9 quality at the meetings. Can you address that?

10 A. Yes. So as we would -- as topics would come up in the
11 investment meetings on the agenda that we had, it was a
12 really -- a really academic give and take of ideas between
13 different parts of the company as represented around the
14 table. And I felt it was very thorough. The -- the room was
15 a safe zone to say whatever you thought and bring big ideas
16 and little ideas into the room, strictly to the benefit of the
17 Plan participants. We were very aware of our role. If, for
18 whatever reason, someone might be straying in a direction, we
19 would self-correct each other to make sure that we were
20 wearing the right hat in the conversation. So the -- I felt
21 that things were discussed thoroughly, decisions were made
22 mindfully, and the consideration was for the benefit of the
23 Plan participants.

24 Q. There's been a lot of testimony in the case,
25 Ms. VanWagoner, about what the Committee did to monitor the

1 investments over time, including its use of the Watch List.
2 What's your -- what's your recollection about the quality of
3 those discussions and -- and the -- the use of the Watch List?
4 A. So the Watch List was -- I think it's been testified by
5 numerous people -- a helpful --

6 THE COURT: Numerous people.

7 THE WITNESS: Numerous.

8 THE COURT: Nine days.

9 THE WITNESS: You're about ready to testify
10 yourself, right?

11 THE COURT: Were you here all nine days?

12 THE WITNESS: No.

13 THE COURT: Oh, you've missed out, Ms. VanWagoner.

14 THE WITNESS: I have -- I have a day job.

15 A. So the Watch List was a really helpful tool for us to
16 focus effort on the different strategies that might be
17 struggling from a performance perspective. But there were so
18 many more aspects to performance than just numbers. There --
19 you know, the investment team, the process itself. And
20 overarching all of this, the market at the time that the
21 investment might go on to that Watch List because funds can
22 underperform in a market environment, and will consider
23 index -- compared to its index, but it can underperform
24 against its peers for a period of time because its style of
25 investing might not be in favor in that particular period.

1 Q. So I want to now turn to the Hewitt report at a high
2 level. Do you recall the -- the Hewitt firm being engaged
3 in -- well, actually, before I do that, I do have one more
4 question about the Watch List.

5 There was testimony from one of plaintiffs' experts
6 that perhaps the Watch List should have been shared with
7 participants on some kind of regular basis. Have you ever
8 heard of that being done?

9 A. No. I think that would be very counterproductive to the
10 behavior you wanted from participants.

11 Q. And why is that?

12 A. Because a fund might fall on to a Watch List for a period
13 of time, but with no change in the process, the people, the
14 philosophy of the investment, the market might shift and favor
15 that particular type of a fund going forward. Since
16 participants tend to overreact to news as opposed to
17 underreact, although inertia is there, sharing a Watch List
18 would be very counterproductive. I have never known a client
19 that has shared a Watch List from an Investment Committee
20 fiduciary's responsibility to plan participants.

21 THE COURT: Hold on. We're going to take a
22 15-minute recess, Mr. Falvey.

23 MR. FALVEY: Thank you, Your Honor.

24 (Recess at 10:30 until 10:49 a.m.)

25 THE COURT: It turns out the judge kicked the cord

1 out, which is what happens.

2 THE WITNESS: I wondered.

3 MR. FALVEY: Surprise, surprise.

4 THE COURT: I need an IT person to help me figure
5 that out.

6 MR. FALVEY: That's always the answer. That's
7 always the answer. Unplugged.

8 THE COURT: Please proceed, sir.

9 MR. FALVEY: Thank you, Your Honor.

10 Q. Before we talk about Hewitt, Ms. VanWagoner, when you
11 joined the Retirement Committee, is one of the things that you
12 did to -- to pull out the list of the investment lineup and
13 study it?

14 A. Yes. I was aware of the investment lineup.

15 Q. And what did you believe broadly about the appropriateness
16 of the investment lineup for the Plan?

17 A. The investment lineup was well diversified within stocks,
18 bonds, cash, and some alternatives, both domestically and
19 overseas, gave the investment -- gave the participants good
20 choices to be able to diversify their core portfolio. So I
21 was comfortable with the lineup, and it had a healthy Target
22 Date Fund.

23 Q. So now let's go ahead to Hewitt and the report that they
24 did for the -- for the firm in 2010.

25 A. Uh-huh.

1 Q. Do you recall in about June 2010 the Retirement Committee
2 being advised that Hewitt had been retained?

3 A. Yes.

4 Q. Do you recall the -- the conversation at the Retirement
5 Committee level at that point in time?

6 A. Not specifically if we're referring to specific minutes.
7 But a general comfort with Hewitt being retained in that
8 facet. The scope of the project, as we understood it, was
9 recordkeeping initially. And then Hewitt, as consultants will
10 do, offered to enlarge the scope of it to include some trend
11 and market information related to their trend survey, their
12 annual trend survey. And being a consultant, I'm aware that
13 that's -- that was a smart thing to do.

14 THE COURT: What's the difference between the work
15 that Hewitt does and DeMarche, for instance? Are they
16 competitors in the marketplace?

17 THE WITNESS: Yes. We are competitors.

18 THE COURT: And generally, what this means is Hewitt
19 makes more money if they can enlarge the scope, right?

20 THE WITNESS: Right, right.

21 THE COURT: They can enlarge their fee as well?

22 THE WITNESS: That's correct. And they had created
23 a DC trend survey, an annual survey based on their client
24 base, which is huge, but based on their client base, and it
25 became a sales tool for them. So if they weren't coming in

1 and expanding the scope on projects, they should have been.

2 THE COURT: Sure.

3 THE WITNESS: And they did.

4 THE COURT: Sure. And when they asked to expand the
5 scope, that's something -- Retirement Committee said, sure,
6 let's give us more information? Is that how that worked?

7 THE WITNESS: Sure. And being aware that it was
8 related to their survey information --

9 THE COURT: Yes, ma'am.

10 THE WITNESS: -- and not necessarily specific to the
11 underlying drivers of process and people and performance of
12 the American Century investments. That's as far as they would
13 want to go because they would want a whole lot more money to
14 do that.

15 THE COURT: Okay. Very good. I'm sorry,
16 Mr. Falvey.

17 MR. FALVEY: Thank you, Your Honor.

18 A. Hi.

19 Q. So the report gets presented to the Committee later in the
20 year, correct?

21 A. That's correct.

22 Q. This has been done with a lot of other witnesses. There
23 was a presentation by the Committee, do you recall, in -- I'm
24 sorry, to the Committee in November of 2010?

25 A. Yes.

1 Q. And discussion at that -- in connection with that
2 presentation at that meeting?

3 A. Yes.

4 Q. And then was there a separate meeting held in December
5 where the report and its -- its recommendations and
6 observations were discussed further?

7 A. Yes.

8 Q. Do you recall that there were three recommendations
9 that -- that the report contained that related to the
10 Retirement Committee?

11 A. Generally, yes.

12 Q. Do you recall that there -- that there was a
13 recommendation that the Committee investigate potential usage
14 of lower cost investment vehicles?

15 A. Yes.

16 Q. Was that done?

17 A. Yes. The Committee took that suggestion and had been
18 considering at the time looking at some lower fee options
19 within our core investment lineup related to commingled
20 trusts.

21 Q. So we'll get to that in just a few moments. Was there
22 also a recommendation that the Committee consider the
23 underutilized funds and consider whether the core lineup could
24 be reduced by eliminating some underutilized funds?

25 A. Yes. And the Committee took up that recommendation and

1 considered the elimination of underutilized funds.

2 Q. And did it, in fact, go ahead and eliminate some
3 underutilized funds in a meeting the subsequent spring, in
4 spring of 2011?

5 A. That is correct.

6 Q. And thirdly, at the time, the Plan included one index
7 fund, correct? The equity index fund?

8 A. That is correct.

9 Q. Did the report recommend that the Committee consider
10 acting -- adding passive funds in categories where they
11 weren't offered?

12 A. Yes.

13 Q. Did the Committee undertake that consideration?

14 A. Yes. There were discussions related to all of the
15 considerations that came out of the Hewitt report, that one
16 included.

17 Q. And what was the determination of the Committee at that
18 time with respect to whether it should add additional passive
19 investment vehicles?

20 A. Well, considering the period in time, there was a lot of
21 concern about risks in the market. The -- the DC world had
22 been shaken pretty solidly on the decline in the market and
23 the great recession. So there was consideration of active and
24 passive, but not to over -- overserve the participant base.
25 And so the Committee looked at the lineup and said, basically,

1 we're good with our core lineup with the adjustments we're
2 making, and the passive indexes are available through the
3 brokerage window. And the company pays for the employee to be
4 able to access that window. So we felt comfortable that they
5 had access if they wanted it. But at this point in time, we
6 didn't want to make those changes.

7 Q. So at a later point in time, jumping ahead to 2013, the
8 equity index fund comes out of the Plan because it was closed
9 by American Century, correct?

10 A. Yes. It was ultimately closed by the company. It was
11 sub-advised by another organization, as I recall.

12 Q. And did you remain on the Committee for about another year
13 after that during the period when the Committee did not --
14 when the Plan did not have any passive funds in its core
15 lineup?

16 A. That is correct. There was a lot of concern in the
17 marketplace about a drawback in the market given historical
18 bull and bear type periods. The general feeling was that the
19 risk was still high in the market.

20 Q. And what was your view as to whether the core lineup, as
21 it then existed, with the PCRA option on the side, whether
22 that lineup was sufficient, given that it did not have an
23 index fund included in the lineup?

24 A. We -- I felt it was a well-diversified lineup. It met the
25 criteria to be able to offer participants a diversified

1 portfolio. So it was -- it was a -- it was comfortable to me
2 to stay as we were. Did I answer all of your question?

3 Q. I think you did.

4 A. Okay.

5 Q. Thank you, Ms. VanWagoner.

6 You talked -- I asked you about whether there was
7 consideration and follow through on the size of the lineup in
8 the wake of the Hewitt report. And you kind of confirmed
9 that, yeah, there was a point in the spring where some funds
10 were removed from the lineup.

11 One of the issues that's come up in the trial
12 through testimony of a number of witnesses is that the
13 Committee considered the sophistication of the participant --
14 participants, broadly speaking, in deciding that this was a
15 good lineup length for this plan. Would you agree with that?

16 A. Yes. I think I was actually quoted in a set of minutes
17 speaking to the sophistication level of the participants in
18 the Plan. As I've seen in my career, the DC plans of asset
19 managers tends to have higher participation, pretty
20 well-diversified portfolios, and use of core options. It's --
21 it's kind of a standalone group within the DC world because of
22 that, as opposed to a rank and file, maybe an organization
23 that has a manufacturing facility or grocery stores or
24 something like that where a good part of the participant base
25 is uncomfortable making investment decisions.

1 Q. Did the Committee think about whether it was seeing
2 evidence of -- of investor participant confusion in
3 determining that the lineup length remained appropriate?

4 A. I don't know that we saw any specific confusion. There
5 were always bits and pieces of the Plan from a participant
6 base that might have been strangely invested, that Lisa Benson
7 kept us aware of outliers. And we worked with her on
8 communication pieces and her with our recordkeeper to help
9 those folks understand whether they're taking on too much risk
10 for generally their generation or maybe not taking on quite
11 enough risk generally for their generation.

12 Q. It's been suggested by one of the plaintiffs' experts
13 that -- excuse me, that the Committee should have undertaken a
14 survey of participants to try to measure levels of investment
15 sophistication. Are you aware that that's a part of the
16 plaintiffs' allegations?

17 A. I'm aware of that.

18 Q. Have you ever seen that done?

19 A. You know, working with as many plans as I have, I have
20 never seen a survey related to investment lineup. I -- no,
21 it's just not -- those are fiduciary decisions that are made
22 on behalf of the participants by investment committees --

23 Q. And more specifically, have you ever seen a survey
24 conducted in which a committee sought to determine how
25 sophisticated its participant base was?

1 A. No. That would be pretty condescending.

2 Q. Did you believe that the Committee had a good read on the
3 range of sophistication of the -- of participants in the
4 fund -- in the Plan?

5 A. Yes. I felt we did because we had, you know, middle
6 management from throughout the organization around the table,
7 and we had a good feeling for whatever level of understanding
8 and work that they did with the investment strategies at
9 American Century.

10 Q. There were a couple of statements made at the tail end of
11 the Hewitt report suggesting that additional consulting
12 services should be considered or could be considered, and
13 there were some proffered next steps. Do you recall those
14 being part of the statements in the Hewitt report?

15 A. Yes, I do.

16 Q. What did you and what did the Committee think of those
17 suggestions?

18 A. Well, personally, having been a consultant for a number of
19 years, I -- I expected to see next steps and some
20 recommendations that might bring them -- Hewitt some
21 additional business and a place on a retainer basis with our
22 organization. We felt we had that skill set around the table,
23 so that really wasn't -- wasn't a concern. So -- and the
24 Committee knew that.

25 Q. Final topic, Ms. VanWagoner. I want to just talk about

1 collective investment trusts a little bit more. Did you play
2 a particular role with respect to the change from mutual funds
3 to collective investment trusts on many of the funds over time
4 while you were on the Committee?

5 A. While I was on the Committee, yes. We had -- in the
6 institutional business had started opening collective
7 investment trusts at the behest of our clients and then
8 proactively after that to help with fees. And I think we've
9 been over enough on what a collective investment trust is.

10 My role within the organization was to work with our
11 trustee to set those up and work through the investment
12 guidelines and coordinate the funding of that with others in
13 the company.

14 Q. And on the Committee, were you the person who was the most
15 closely familiar with what was being done on collective
16 investment trusts in the organization?

17 A. Yes. And then when Margie Morrison came on board, both of
18 us would have been equally knowledgeable there.

19 Q. And did you effectively serve as the point person for
20 making sure the Committee became aware from meeting to meeting
21 of what mutual funds were eligible to be converted to
22 collective investment trust?

23 A. Yes. I would make them aware of the activity between the
24 mutual fund -- the strategies of mutual funds and the
25 collective investment trusts so that they were aware of what

1 was either coming available or was currently available. And
2 then we would marry that against the guidelines we had about
3 asset level.

4 Q. And did the Retirement Committee make sure that where the
5 collective investment trust was available that the Plan was
6 promptly moved into the collective investment trust vehicle?

7 A. The -- yes. The Committee was made aware, would decide,
8 and then the process of moving from the mutual fund to the
9 collective investment trust might take a little bit of time.
10 It wasn't an overnight type of an arrangement. But -- but,
11 yes, I would make sure that they were aware.

12 Q. And so now I want to just show you briefly,
13 Ms. VanWagoner, five sets of minutes where there's resolution
14 adopting the collective investment trust, just so we have
15 those in the record.

16 A. Okay.

17 Q. And let's start with JX 15, please, Chris at page 1.

18 This, as we can see, is the April 6, 2011, meeting,
19 correct?

20 A. Correct.

21 Q. And there's discussion at the bottom about the CIT options
22 available, correct?

23 A. Correct.

24 Q. And let's flip to the next page, Chris.

25 And we can see that among the resolutions on page

1 2 -- whoops, on page 2, are the resolutions to bring three
2 collective investment trusts in in place of their equivalent
3 mutual funds, correct?

4 A. That's correct.

5 Q. Let's go to JX 24, please, Chris.

6 This is the next year, June 2012. Do you see that?

7 A. I do.

8 Q. And let's go to page 3, please, Chris. Once again,
9 there's a discussion on -- at this meeting about your bringing
10 up again some of the availability of some collective
11 investment trusts. Do you see that?

12 A. I do.

13 Q. And there's a resolution at the bottom that there's one
14 available collective investment trust, and the Plan moves into
15 it, correct?

16 A. That's correct.

17 Q. Thank you. Let's bring up JX 29, please, Chris.

18 It's now a year later, June 2013. Do you see that?

19 A. Yes.

20 Q. Let's go to page 2, please, Chris.

21 And once again, under -- in the Performance Reports
22 section, do we see that you're highlighting the criteria for
23 adding collective investment trusts to the lineup, a topic
24 that's been already discussed at this trial. Do you see that?

25 A. Yes, I do.

1 Q. And let's go to the next page, Chris. I'm not sure where
2 we're actually at. And next page, Chris. Let's go back to
3 page 3 for just a second.

4 All right. So let's move on to the next one, JX 29,
5 please, Chris.

6 THE COURT: We're on JX 29.

7 MR. FALVEY: Oh, that was it.

8 THE COURT: Yeah.

9 MR. FALVEY: Sorry. So JX 30. Thank you, Your
10 Honor.

11 THE COURT: Yes, sir.

12 Q. So now we're out another year to July of 2013, correct?

13 A. Correct.

14 Q. Can we go to page 2, please, Chris?

15 And there's a discussion again of availability of
16 collective investment trusts. Do you see that?

17 A. Yes.

18 Q. And there's a resolution to move one of the mutual funds
19 into a collective investment trust that had become available,
20 correct?

21 A. That's correct.

22 Q. And finally, let's go to DX 507, please, Chris.

23 MR. BOOTH: 507?

24 MR. FALVEY: 507, correct. Page 1.

25 Q. This is a -- an action by unanimous written consent by the

1 Committee, correct?

2 A. Correct.

3 Q. Probably toward the end of your tenure, correct?

4 A. Yes. I would say.

5 Q. And is this the resolution that brings in all the target
6 date funds over to a CIT vehicle, correct?

7 A. Yes. That's correct.

8 Q. Thanks, Chris.

9 And so that exercise that we just walked through,
10 does that show the ongoing effort by the Committee to look for
11 lower cost vehicles to move to while accomplishing the same
12 investment strategy?

13 A. Yes.

14 Q. Did you ever take direction from anyone outside of the
15 Retirement Committee, Ms. VanWagoner, in taking any action as
16 a member of the Retirement Committee for the Plan?

17 A. No.

18 Q. Were you or, in your observation, anybody else on the
19 Committee ever influenced by anyone outside the Retirement
20 Committee in decisions that you made on behalf of the Plan?

21 A. No.

22 Q. Did the Retirement Committee ever take into account the
23 financial interest of American Century in any way in making
24 decisions -- decisions on the Plan's behalf?

25 A. No.

1 Q. Whose interests did you act on in making all the decisions
2 that the Retirement Committee made?

3 A. As I stated before, our fiduciary responsibility was to
4 the participants in this Plan.

5 Q. Over the years that you've served on the many committees
6 that you've served on and advised committees as a consultant,
7 Ms. VanWagoner, have you had occasion from time to time to
8 compare the -- the Retirement Committee at American Century to
9 the various others that you've observed and worked with?

10 A. Yes.

11 Q. And what's the comparison that you have made? What's the
12 observation that you've made?

13 A. It's interesting because I -- I knew when I was on the
14 American Century Committee that it was a really good process.
15 We had incredible reporting preparing us for meetings. We all
16 came to the meeting prepared to discuss the -- the topics on
17 the agenda. There was good give and take in the Committee
18 itself. There was -- there weren't situations where we were
19 having a push and pull by more senior people in the room. And
20 we mindfully, thoughtfully considered the decisions that we
21 made as a group to the benefit of those participants.

22 I have used this Investment Committee process as an
23 example to other clients of mine over the years on things that
24 they might look to do better and consider going forward. So
25 I've used it as a -- as a really good example of positive

1 process, good give and take discussion, thoughtful decision
2 making, and -- and wearing that fiduciary hat while in the
3 room.

4 Q. Ms. VanWagoner, you've spent a number of days in the back
5 of this courtroom during this trial, haven't you?

6 A. I have.

7 Q. Why?

8 A. It's been a long time since I served on this Investment
9 Committee. And coming into this, I have to say I was a little
10 baffled because of what I just said. I knew we had done well.
11 And I wanted to sit and listen to the testimony of others to
12 get a sense for what the real issues were here. And it was
13 helpful for me to do that but to also reaffirm the work that
14 we did when I was on this committee from a process
15 perspective, keeping our minds on these participants, and
16 making good decisions to help them not make bad decisions.

17 MR. FALVEY: That's all I have. Thank you, Your
18 Honor.

19 THE COURT: All right. Thank you. Mr. Specht, are
20 you up to bat?

21 MR. SPECHT: I am, Your Honor.

22 THE COURT: All right. All right, sir. Please
23 proceed.

24 MR. SPECHT: Thank you, Your Honor.

25 CROSS-EXAMINATION

1 BY MR. SPECHT:

2 Q. Ms. VanWagoner, my name is Brock Specht. We have not met
3 before, but good morning to you. I'm going to ask you a few
4 questions to follow-up on what Mr. Falvey was talking with you
5 about. I want to start with one of the last things that you
6 went through with him, which was the series of documents where
7 you were changing from -- I think it was mostly changing from
8 mutual fund vehicles to collective investment trust vehicles.
9 Do you recall that?

10 A. I do.

11 Q. Okay. And every time you did that, you were going from an
12 American Century fund to an American Century fund, right?

13 A. It was simply a change in vehicle for a lower cost for the
14 participants.

15 Q. So you didn't, in any of those instances, look to see
16 whether there was a collective investment trust by T. Rowe
17 Price or some other manager that would fit in that asset class
18 and be even less expensive, correct?

19 A. No, we did not.

20 MR. SPECHT: Bring up DX 842, please.

21 MS. PATHMANN: 842?

22 MR. SPECHT: Yes.

23 Q. I think on your direct testimony, ma'am, you testified
24 that your role was in this line of authority at American
25 Century; is that right?

1 A. As best I can fit it with this lineup, yes.

2 Q. Okay. So -- and not just your time on the Committee but
3 the entire time you worked there, did you always report up
4 through the chief client officer?

5 A. I believe so, yes.

6 Q. Okay. And that's a -- that's a sales and distribution
7 role, right?

8 A. Yes.

9 Q. Or a channel, sales channel?

10 A. Yes.

11 Q. Okay. I think you mentioned one of your real
12 responsibilities was cross-sell responsibilities?

13 A. Uh-huh. That's correct.

14 Q. What does that mean?

15 A. So where we had Plan sponsors in a given investment
16 strategy at American Century, I had a relationship with the
17 committees and the main person contact for these firms. And I
18 would become aware of activities that they were doing as a
19 committee or considering going forward. And having been a
20 consultant for a lot of years would work with them to see if
21 there was something that American Century had that might fit
22 that particular bucket. So cross-selling is selling other
23 things into American Century.

24 Q. Thank you. For the various people that -- well, let me
25 ask you one question. The chief client officer, did that

1 position change, the person that held that position change
2 during your time?

3 A. Oh, I'm sure it did.

4 Q. Okay. For any of the folks that had that job, do you know
5 whether part of their compensation package depended on sales
6 goals?

7 A. I don't know specifically. I -- I would assume it did.

8 Q. Okay. Was that also true for you?

9 A. I had -- yes. I had compensation goals related to
10 cross-selling.

11 Q. Okay. And these are sales goals obviously for American
12 Century products, right?

13 A. They hoped so.

14 Q. All right. DX 846, please. So we've got the head shots
15 of all the Committee members, including yourself and everyone
16 else. I think this is probably obvious, but I don't know that
17 we've been explicit about this in this record. All of the
18 people that are shown here, their day job was as an employee
19 of American Century, correct?

20 A. Yes.

21 Q. Okay. And so for everyone on the Committee, their
22 livelihood in some way turned on the success of the American
23 Century, right?

24 A. Yes.

25 Q. And that would be unusual for an investment committee of

1 any other type of retirement plan or foundation or other
2 entity, right?

3 A. Generally, yes.

4 Q. Okay. None of the other boards or committees that you
5 serve on consists entirely of people whose day jobs depend on
6 the success of the investment manager that you're using, true?

7 A. Investment committees or just boards overall?

8 Q. Investment committees.

9 A. Investment committees. No, that's not true. There are
10 investment -- there are investment committees that I sit on
11 that are made up of board members, so board members outside of
12 staff.

13 Q. Sure.

14 A. With staff support.

15 Q. How did -- so -- I think I'm asking you maybe a slightly
16 different question.

17 A. Okay.

18 Q. Those committees have investments, right?

19 A. Yes.

20 Q. Okay. None of the people that sit on those committees,
21 their livelihood for their day job, none of that turns on the
22 success of the underlying company that manages the
23 investments; is that correct?

24 A. Well, let me be clear. The committees that I'm talking
25 about are for foundations, so for charitable giving or church,

1 so charitable. None of the ones I just described to you are
2 related to DC plans. That -- because -- except for my own
3 company, DeMarche.

4 Q. Sure.

5 A. And we're all employees of DeMarche.

6 Q. Sure. You were comparing the process that the American
7 Century Committee used to some of the other committees you sit
8 on, do you recall that?

9 A. Uh-huh. Uh-huh.

10 Q. And I'm simply trying to point out -- and I think you'll
11 agree with me -- that for all the other committees that you
12 sit on, there is no one on that committee whose day job
13 depends on the success of the investment manager you're using;
14 is that true?

15 A. Not for the foundations and endowments. That's a
16 different type of setup. So not for those. And for
17 DeMarche's 401(k) plan, DC plan, yes. Those people all work
18 for the company.

19 Q. Right. I'm talking about the underlying investments. Are
20 those DeMarche investments, or are you using other investment
21 managers?

22 A. Oh, no. We do use -- we do use a DeMarche investment, but
23 we also -- we're not an investment management firm. We're a
24 consulting firm. But we have a small discretionary business.
25 So our Global Tactical Asset Allocation Fund is made available

1 through our 401(k) plan to plan participants that meet the
2 criteria to invest.

3 Q. Okay.

4 A. That's probably more than you wanted.

5 THE COURT: I think your point is well taken. And
6 that's been the deal here, right, that the livelihood of
7 these -- the Retirement Committee members is all tied within
8 the success of American Century, right?

9 MR. SPECHT: I think that's right.

10 THE COURT: I think by now we can take -- I know
11 that everybody in the room knows that, right? So I understand
12 what you're saying.

13 MR. SPECHT: I'll move on, Your Honor.

14 THE COURT: Yes, sir.

15 THE WITNESS: Well, I would argue it's a good setup
16 because we were most familiar with the funds, the people who
17 invested the funds.

18 THE COURT: Sure. There's been a lot of evidence
19 that this is more advantageous in some respects --

20 THE WITNESS: Absolutely.

21 THE COURT: -- because of your -- the understanding
22 of the Committee.

23 THE WITNESS: Absolutely.

24 THE COURT: But that's not what he's asking right
25 now. Go ahead, ,Mr. Specht.

1 MR. SPECHT: All right. You can take those down,
2 Karla.

3 Q. Occasionally during your time on the Committee, you'd have
4 representatives from out -- from the different funds that are
5 in the Plan come to give presentations to the Committee. Do
6 you recall that?

7 A. Yes,

8 MR. SPECHT: Okay. Bring up PX 462. And maybe,
9 Karla, just blow up the top, the table on the top.

10 Your Honor, this -- this is a document that's in
11 evidence, but I think this is the first time we're seeing it
12 through the testimony here. This is a chart that collects the
13 number of Lipper fund awards that were received by different
14 fund families. This came to be because in the prior filings
15 in the case, American Century, in their filings to the Court
16 and also I believe one of their experts, relied on these
17 Lipper fund awards that had been given to American Century.
18 Some of the funds over the years have gotten some of these
19 awards.

20 THE COURT: So this is already in evidence?

21 MR. SPECHT: It is in evidence. That's correct.

22 THE COURT: Okay.

23 MR. SPECHT: It's part of the stipulated set of
24 exhibits.

25 THE COURT: But a witness hasn't testified about it?

1 MR. SPECHT: Correct.

2 THE COURT: Okay.

3 MR. SPECHT: I was hoping I could get some brownie
4 points for something new.

5 THE COURT: Thank you. Mr. Specht, you've got --
6 you know, if I did a chart like this for that table and
7 brownie points, Karla's number one. You're -- you're fighting
8 it out with Richter a little bit here.

9 MR. SPECHT: All right. Sounds good.

10 THE COURT: But this is coming up, though.

11 Q. So what this -- what this chart does it looks at
12 Dr. Pomerantz's Model Number 3, which is where he compares or
13 looks at the most highly utilized fund families in different
14 401(k) plans and collects the number of awards that those --

15 THE COURT: So here's a question that I asked
16 Mr. Lukas to ask all future questions -- all future witnesses
17 related to the Pomerantz testimony. You know that, right?

18 MR. SPECHT: I do, Judge.

19 THE COURT: Thank you.

20 MR. SPECHT: And I think I'm not even going to go
21 where you're worried about.

22 THE COURT: All right. Thank you.

23 Q. So, Ms. VanWagoner, now that I've kind of set the table on
24 all of this, you've never seen this chart before, right?

25 A. I have not.

1 Q. But you do -- I would assume, given your day job as an
2 investment consultant, you're familiar with the -- the names
3 that are on here. These are other asset managers, right?

4 A. Yes.

5 Q. Okay. Is it safe to say -- I'm not going to go through
6 the whole list one by one. But is it safe to say that the
7 Committee never had representatives from any of these asset
8 managers come in and give presentations at any of your
9 meetings?

10 A. During my tenure, no.

11 Q. And if we're just looking at the number of awards given --
12 and I'm not asking you to testify about those awards, but it
13 looks like a number of the -- the names on this list, like
14 American Funds, Fidelity, PIMCO, T. Rowe Price, they seem to
15 be the ones that are getting most of the awards. Do you see
16 that?

17 A. I see that their numbers are higher than others.

18 Q. Okay. And would you, given your knowledge of these firms,
19 agree that those would be the ones that you would typically
20 expect to see winning awards from an organization like Lipper?

21 A. I don't know what these awards are based on --

22 Q. Sure.

23 A. -- so I don't know how they're being categorized into this
24 table. So, I mean, I would expect to see all these names,
25 including American Century --

1 Q. Sure.

2 A. -- listed -- listed here. They all have standout
3 investment strategies that would -- if that's what the
4 criteria is. I don't know if it's growth in the strategy or
5 perform- -- I'm not sure what the Lipper Awards -- this chart
6 is based on.

7 Q. Okay. But these are -- I think you said these are the
8 companies that have standout investment strategies. Is that
9 what you said?

10 A. I'd say that a number of these companies on this list have
11 competitive investment products, including American Century.

12 Q. Fair enough.

13 Karla, you can take that one down too. Let's go to
14 JX 12. And, Karla, can you blow up -- well, before we go
15 there.

16 Just because we all have seen JX 12 a number of
17 times, I am not sure if you've seen it, ma'am. This is the
18 minutes from the December 13, 2010, meeting of the Investment
19 Committee. Do you see that?

20 A. Yes.

21 Q. And you are familiar with this document, right?

22 A. From this page, yes.

23 Q. Yeah. And my assumption is you've reviewed this in
24 preparing to testify today; is that fair?

25 A. That's fairly possible, yes.

1 Q. Okay. Now, Karla, can you blow up this?

2 So on your direct testimony, you talked about a
3 conversation that the Committee had in response to the Hewitt
4 report about passive and active funds. Is this the
5 conversation you were talking about?

6 A. Can I see the date again, please?

7 Q. Sure.

8 Can you back it up, Karla?

9 A. This date is after the presentation was made to us --

10 Q. Okay.

11 A. -- that year.

12 Q. So is this --

13 A. The Hewitt presentation was made -- the Hewitt
14 presentation was made to us prior to this meeting, as I
15 recall.

16 Q. Okay. The conversation that you testified about on
17 direct --

18 A. Yeah.

19 Q. -- is that a different conversation from the one that's
20 captured in these minutes?

21 A. I don't remember the direct question, but I recall having
22 conversations about active and passive as part of the
23 follow-up with the Hewitt presentation. But it was
24 considerations in other meetings as well. I believe we had --
25 we did. We had a S&P 500 Index Fund in the plan for a period

1 of time under my tenure. I don't recall that it was very well
2 utilized, though.

3 Q. Do you recall any conversation from your time on the
4 Committee other than the one captured in these minutes that
5 involved a discussion of adding passive funds to the Plan
6 lineup?

7 A. Not specifically to adding passive funds, but we were
8 aware on a quarterly basis what passive funds were doing
9 because the indexes that the fund -- that American Century
10 funds were being compared to were passive funds ultimately.
11 So at a, you know, performance criteria level, but not
12 specifically about adding passive to the core lineup, being
13 very aware and talking amongst ourselves that the passive
14 allocations that participants felt they needed and wanted they
15 could get through the brokerage window.

16 Q. So other than this, no other conversations about adding a
17 passive fund to the Plan lineup that you recall?

18 A. Not specifically. Not during my tenure.

19 Q. All right. All right. We're going to blow that paragraph
20 up again, Karla. Thank you.

21 So this set of minutes refers to having a discussion
22 about a philosophical position on active -- on passive and
23 active funds and then the Committee's views on Hewitt's
24 comments on passive and active funds. Do you see that?

25 A. I see that, yes.

1 Q. Okay. Now, the reason the Committee is having that
2 philosophical conversation is that active -- American Century
3 is an active management organization almost exclusively at
4 that time, right?

5 A. I don't think that's the reason the conversation was being
6 had. We were thoughtfully considering the Hewitt presentation
7 and the information and education that was brought to us by
8 them. And that probably initiated the philosophical
9 discussion on active versus passive and the discussion that
10 you're referencing here.

11 To your direct question, yes, American Century is an
12 actively managed investment manager.

13 Q. So are you saying that the -- the reason that the
14 Committee was having this conversation was not the fact that
15 American Century is an active management organization at this
16 time almost exclusively?

17 MR. FALVEY: Objection. Misstates, Your Honor.

18 THE COURT: Sustained.

19 A. What does that mean?

20 Q. Do you have a copy of your deposition in front of you?

21 A. I'm sure I do.

22 Q. All right. It should be attached to that binder there.
23 Can you turn to page 32 of the deposition?

24 A. Sure.

25 Q. Are you on page 32?

1 A. Hang on. Hang on. Hang on. It's page numbered
2 differently. Okay. Yes.

3 Q. All right. And just to orient you, do you see at the top
4 of the page, you're talking -- talking about the Hewitt
5 presentation on line 6? Do you see that?

6 A. Yes.

7 Q. Okay. And then if you go down to the bottom of the page
8 on line 23, you're asked the question: And why did it -- why
9 did you have that conversation as it related to passive
10 investing?

11 And your answer was: American Century is an active
12 management organization at that time, almost exclusively.

13 Did I read that correctly?

14 A. You did read that -- you did read that correctly, but the
15 context of the conversation is shown on this page to be deeper
16 than that specific question. The question prior included.

17 Q. You're talking about the question that starts at line 10?

18 A. Eighteen.

19 Q. Okay. Line 18:

20 "Q. Sure. Were there conversations then about this
21 issue about it being only American Century branded funds and
22 being offered in the core lineup?"

23 Your answer was:

24 "A. As it related to passive investing, yes."

25 And then the question is:

1 "Q. And why did -- why did you have that
2 conversation as it related to passive investing?"

3 And the answer was:

4 "A. American Century is an active management
5 organization at the time almost exclusively."

6 Did I get that all right?

7 A. That is correct. It's not really an answer to the
8 question, though.

9 THE COURT: Okay. We're going to move on. Move on,
10 Mr. Specht. Thank you.

11 MR. SPECHT: I'm done.

12 Q. Safe to say that's one of the things you talked about as
13 part of this conversation, the fact that American Century is
14 an active management firm? Would you agree with that?

15 MR. FALVEY: Objection. Asked and answered.

16 THE COURT: I think -- well, I'm going to allow that
17 question, I think. So safe to say that's one of the things
18 you talked about as part of this conversation, the fact that
19 American Century is an active management firm? Was that part
20 of your conversation?

21 THE WITNESS: I don't recall that it was
22 specifically part of the conversation.

23 THE COURT: Everybody in that room knew you were an
24 active management firm?

25 THE WITNESS: Yeah. It was a known fact.

1 THE COURT: Otherwise, they wouldn't be in that room
2 if they didn't understand what the work of American Century
3 is -- or this Committee wasn't comprised of anyone who didn't
4 understand what American Century did?

5 THE WITNESS: That is correct.

6 THE COURT: And your position is that's what made us
7 great --

8 THE WITNESS: Yeah.

9 THE COURT: -- because you understood not only the
10 funds but what went into the investments that made up these
11 funds, true?

12 THE WITNESS: Absolutely.

13 THE COURT: All right. Please move on.

14 Q. And to follow-up on what -- the point the judge just made,
15 one of the reasons that a passive option or additional passive
16 options weren't added at that time was because American
17 Century had a culture of active management; is that true?

18 THE COURT: Yeah. I'm going to answer that for her.
19 They had a culture of active management and -- and I've heard
20 nine days of evidence. I'm sorry to be short with you,
21 Mr. Specht, but you have got -- let's go down the road. They
22 were active management. The defense -- there's no one
23 contesting that part. And -- and I'm going to find, even if
24 they contest it, it's an active management firm. So that's
25 going to be in my order, okay? I promise you. I'll put that

1 in the order. Please -- please move on down the road so I can
2 write that order one day.

3 MR. SPECHT: Believe it or not, I'm making quite a
4 bit of progress in my outline, Judge.

5 THE COURT: Okay. God bless you.

6 Q. All right. Let's move to the topic of stable value.
7 During your tenure on the Committee, do you recall there being
8 any discussion about adding stable value fund to the plan?

9 A. I don't remember specific discussion about stable value
10 personally. So -- sorry, I can't help you there.

11 Q. Fair enough.

12 A. I mean, I -- it's hard to separate what you know now with
13 what you knew then.

14 Q. I understand.

15 A. And the concerns about stable value at that time in the
16 industry itself --

17 Q. All right.

18 A. -- were very high.

19 Q. Your understanding is that there was a stable value in the
20 Plan at one point in time, right?

21 A. Yes.

22 Q. Okay. And that was an American Century stable value
23 product, right?

24 A. I -- I think I remember that it was sub-advised by
25 JPMorgan --

1 Q. It was branded?

2 A. -- at one point in time and branded American Century, yes.

3 Q. Branded American Century.

4 A. We had a couple funds back there that were branded
5 American Century --

6 Q. Sub-advised?

7 A. -- and outsourced and sub-advised, yes, by JPMorgan.

8 Q. Okay.

9 A. And Northern Trust, yeah.

10 Q. New topic. Revenue sharing. You're familiar with that
11 topic, correct, or that concept?

12 A. I am.

13 Q. Okay. The Court's heard about revenue sharing, but just
14 to make sure we're all on the same page, revenue sharing
15 refers to the practice where the investment manager will share
16 a portion of the investment management fees that are charged
17 on a mutual fund with a service provider, correct?

18 A. Yes.

19 Q. Typically, the recordkeeper?

20 A. That's generally what that -- what that means, yes.

21 Q. Typically, with the recordkeeper, right?

22 A. Well, it depends. There are plans that rebate that back
23 to the plan participants, but it goes back through the
24 recordkeeper. And at the end of the day, the recordkeeper is
25 going to be paid by somebody to do their job.

1 Q. So sort of just from a mechanical standpoint, the -- the
2 participants pay a fee on the mutual funds in the Plan, right?

3 A. They pay a fee -- well, we're going to get into a little
4 gray territory for me because my expertise is in different
5 spots. This is more a Lisa Benson question.

6 THE COURT: I don't want you -- I don't want you to
7 answer any questions you don't know the answer to.

8 THE WITNESS: Okay.

9 A. Ask the question again.

10 Q. Do participants in a Retirement Plan who are invested in
11 American Century mutual fund, pay a fee on that mutual fund?

12 A. Yes. Participants of -- or investors in mutual funds pay
13 a fee --

14 Q. Okay.

15 A. -- on the mutual funds.

16 Q. And when revenue sharing comes into play, revenue sharing
17 would be a portion of that fee that's paid by the participant
18 is shared by the fund manager with some other entity, right?

19 A. I'm not -- help me understand where you're going with this
20 question because I'm not really sure where you're at.

21 Q. Yeah. Maybe it's easier to put a concrete example here.

22 A. Okay.

23 Q. So JPMorgan was the Plan's recordkeeper when you joined
24 the Committee, correct?

25 A. That's correct.

1 Q. And JPMorgan received revenue sharing payments from the
2 American Century mutual funds that were in the Plan, right?

3 A. That's what I understood.

4 Q. And that's what JPMorgan was paid for its recordkeeping
5 services?

6 A. I don't know if it was entirely or partially, so I
7 couldn't -- I know there was -- like I said, the recordkeeper
8 is going to get paid somehow.

9 Q. Okay. For the time that you were on the Committee, do you
10 recall there ever being any discussion about revenue sharing?

11 A. Insofar as we reviewed the dollar figures associated to
12 expenses of the Plan, yes. But, again, we're getting a little
13 out of my wheelhouse. I depended strongly on those that
14 worked directly with the recordkeeper direct -- you know, had
15 those relationships directly.

16 Q. Let's talk a little bit about the Watch List.

17 Karla, could you bring up JX 001?

18 So these are the minutes from the May 7, 2009,
19 meeting of the Retirement Committee. You were on the
20 Committee at that point in time, correct?

21 A. Yes.

22 Q. And I believe you were absent --

23 A. But I was absent from this meeting, yes.

24 Q. You anticipated where I was going to go. You were absent
25 from this meeting, that's right. Typically, you would have

1 reviewed these minutes at some point, correct?

2 A. Yes. At some point, I would have reviewed them.

3 Q. And usually at the next meeting, the first order of
4 business, or one of the first orders of business is to review
5 and approve the minutes from the prior meeting, right?

6 A. Yes.

7 Q. Okay. Karla, could you go to page 2? We have a heading
8 here, Watch List. And if we could just blow that up.

9 So there's a discussion here that says that
10 Mr. Bouffard led the group through a review of the Watch List.
11 And then it goes down a little bit and said -- says,
12 Mr. Bouffard noted that a prototype Watch List using
13 information ratio is being considered by American Century and
14 will be proposed to the mutual fund directors later this year.
15 He suggested the Retirement Committee consider following the
16 lead of the directors if and when the firm switches, which
17 would mostly be effective January 1st, 2010.

18 Do you recall finding out about this proposal?

19 A. I recall -- well, I can't say I recall reading these
20 minutes, but I feel confident that I read the minutes.

21 Q. Okay. And is it your understanding that what is being
22 described here is that the mutual fund company is adopting a
23 new methodology for its Watch List?

24 A. Yes. That's what it says.

25 Q. Okay. And Mr. Bouffard's proposal is that if the mutual

1 fund company goes along with that change, we should follow
2 suit?

3 A. Yes. I believe -- I recall conversations -- not in this
4 meeting because I wasn't in this meeting -- about if we're
5 going to set the bar higher for our investment professionals
6 to be compensated on performance and measure them against this
7 type of a benchmark that it was probably a good idea for our
8 Investment Committee to raise the bar as well.

9 Q. So you believed that this was going to set the bar higher,
10 this change?

11 A. I think it makes the bar more specific --

12 Q. Okay.

13 A. -- in this measure only, one of many considerations when
14 looking at a fund.

15 Q. But this is something that originated not with the
16 Retirement Committee but with the mutual fund company, right?

17 A. You know, it was pretty common in Defined Contribution
18 Investment Committee policies for and -- and mutual fund
19 companies, for that matter, for investment -- for information
20 ratios to be a consideration of performance. And consultants
21 were proposing the use of this measure as well, pretty
22 strongly.

23 Q. I probably could have asked you a more specific question
24 there. This notion of switching the Watch List methodology is
25 something that originated with the mutual fund company, not

1 the Retirement Committee, correct?

2 A. I believe it was a --

3 MR. FALVEY: Objection. She testified she wasn't at
4 the meeting, and I -- I think it lacks foundation.

5 THE COURT: If you know the answer. I -- yeah.

6 THE WITNESS: I can only go on what's written.

7 THE COURT: She -- but she testified she read the
8 minutes, I think, Mr. Specht, and that that was part of her --
9 part of your responsibilities when you're serving on the
10 Retirement Committee is if you missed a meeting, you'd read
11 the minutes, right?

12 THE WITNESS: Read the minutes. Yeah.

13 THE COURT: Okay. I'm going to allow that question.

14 A. Could you say it again?

15 Q. Yeah. So the -- the proposal to change the methodology
16 for the Watch List that we're discussing here, that originated
17 with the mutual fund company, not the Retirement Committee,
18 correct?

19 A. Yes.

20 Q. All right. Let's go to PX 219.

21 So we were just in May 2010 -- 2009, and now we can
22 see here we have the July 1st, 2009, minutes?

23 A. Yes.

24 Q. And you were at this meeting, correct?

25 A. That's correct.

1 Q. And, Karla, if you could back out.

2 The next item here is approval of minutes. And it
3 looks like they were reviewed and approved?

4 A. Yes.

5 Q. So that's the set of minutes we were just looking at,
6 right?

7 A. I believe so, yes.

8 Q. Okay. And then -- could you go back out to the Watch
9 List, which is at -- you can do the whole -- yeah, that whole
10 thing. Okay. So under the Watch List here, we've got some
11 more discussion, I think, on this topic of changing the
12 methodology. It says, Mr. Bouffard mentioned that discussions
13 are still going on within American Century regarding a
14 prototype Watch List, which uses information ratios. If the
15 American Century boards move to the new criteria, Mr. Bouffard
16 will likely recommend that the Retirement Committee adopt this
17 approach, as well.

18 Do you see that?

19 A. I do.

20 Q. And then it goes on. It looks like you had a question.

21 It says, In response to a question by Ms. VanWagoner
22 asking for a primer on the new Watch List criteria,
23 Mr. Bouffard indicated he will provide materials to the
24 Retirement Committee members and will provide training to the
25 members on the proposed approach at the next Retirement

1 Committee meeting.

2 Do you see that?

3 A. I do.

4 Q. And so it's possible that in connection with this meeting
5 that this is the first time that you're learning about that --
6 this new proposal; is that fair?

7 A. No, because I would have read the minutes of the last
8 meeting.

9 Q. Oh, sometime between the two meetings then?

10 A. Most likely, yes.

11 Q. Okay. Do you happen to know whether this proposal to
12 change the methodology of the Watch List was something that
13 Mr. Bouffard was working on in his day job at American
14 Century?

15 A. I don't know specifically.

16 Q. Could we go to JX 6, Karla?

17 So now we've got the materials for the June 30,
18 2010, meeting. And if we go to page 19.

19 Is this the primer that Mr. Bouffard said he was
20 going to give on how this new Watch List material -- criteria
21 would work?

22 A. I see the document says page 1 of 2. Is there another
23 page following it?

24 Q. Oh, sure. I'm not suggesting this is the entire thing. I
25 guess my question is, is this part of it, if you recall?

1 A. This looks familiar, yes --

2 Q. Okay.

3 A. -- for that purpose.

4 Q. Okay. Karla, can you blow up the top half?

5 So the -- the new proposed benchmark methodology
6 that's being described here, it says, The Investment Team
7 compensation was recently changed to be "benchmark oriented
8 and peer group aware" from previously being "peer group
9 oriented and benchmark aware".

10 Is that consistent with your recollection of how
11 this Watch List methodology was changing?

12 A. I wasn't in the meetings for the changing of the company's
13 methodology, but as it relates to this being shared with us in
14 the Investment Committee, this is how it was shared, yes.

15 Q. Okay. Your understanding was that the proposal was to
16 switch the benchmark methodology that the Retirement Committee
17 uses to monitor the Plan so that it would align with the
18 methodology that the Investment Team compensation used; is
19 that fair?

20 A. I don't know that I would go that far. I knew that we
21 were changing from a -- changing it to include an information
22 ratio criteria. How that ended up impacting Investment Team
23 compensation was just algebra.

24 Q. Okay. So your only knowledge of that is just what would
25 have been represented in this document?

1 A. Yes.

2 Q. Okay. And earlier, you said that this was a heightened
3 standard or something along those lines. Do you see the third
4 bullet point here says, The proposed methodology is similar in
5 construct and in its results to the current criteria?

6 A. Yes. I think I corrected my statement to say it was just
7 a more specific set of rails because of the breakdowns of the
8 information ratio, and the Watch List criteria associated to
9 it.

10 Q. Karla, can you back out and go to the box below?

11 And we've talked about this, but the -- this is
12 the -- on the right-hand column here, this proposed Watch List
13 benchmark methodology --

14 A. Uh-huh.

15 Q. -- that's the methodology that was ultimately adopted by
16 the Committee, correct?

17 A. Without having you drag out the documents, I'm going to
18 assume you're correct.

19 Q. Okay.

20 MR. FALVEY: Excuse me. I'm sorry to interrupt,
21 Your Honor. Can I just ask to see the full document, because
22 I'm just trying to follow the testimony. Can I just go back
23 to what the full exhibit number is?

24 THE COURT: Would you show the whole document?

25 MR. SPECHT: Happy to do so, Your Honor.

1 THE COURT: The other second page?

2 MR. FALVEY: Thank you, Your Honor.

3 THE COURT: All right.

4 MR. SPECHT: Great. Can we go back to page 19? If
5 you could blow up the box.

6 Q. And I think the record will show that this is the Watch
7 List methodology that was used by the Retirement Committee
8 subsequent to this time frame. My question for you, ma'am, is
9 it consistent with your recollection that the Committee used a
10 Watch List methodology that calculated information ratio based
11 on gross performance?

12 A. That's what this says. I'd have to see the Investment
13 Policy Statement as it was amended to verify that. But
14 that's -- it says proposed, so I don't know if that was the
15 final version or not.

16 THE COURT: You've got about 13 minutes until lunch
17 recess.

18 MR. SPECHT: Thank you, Your Honor.

19 Q. Let's take a look at JX 54. This is the Investment Policy
20 Statement as of -- or amended as of August 1, 2010.

21 A. Uh-huh.

22 Q. And can we have page 11, please? And maybe you can just
23 blow up this top part.

24 Okay. So the Investment Policy Statement says that
25 monitoring should utilize the criteria that were the basis of

1 the investment selection decision. If a core investment
2 option meets the following criteria, it will be subject to
3 more frequent monitoring ("Watch List") by the Retirement
4 Committee.

5 And here, do you see information ratio is calculated
6 using gross performance?

7 A. Yes. That's correct.

8 Q. Okay.

9 THE WITNESS: Sorry, Judge.

10 MR. SPECHT: That's okay.

11 THE COURT: You're fine.

12 MR. SPECHT: And now if we could go back, Karla, to
13 the one we were just on JX 6, page 19.

14 THE COURT: You know, Ms. VanWagoner, I -- I want
15 you just to tell us what you know, not what somebody thinks
16 you should know or -- so your --

17 THE WITNESS: Sure.

18 THE COURT: -- you don't -- your apology is not
19 necessary. So you're doing fine. Thank you.

20 A. I would add that it was one of other criteria for Watch
21 List in the document you just previously showed us. There
22 were other criteria related to Watch List. It isn't just
23 related to information ratio. I believe I saw in there there
24 was some criteria about discretion for the Retirement
25 Committee regarding things like philosophy, process, people,

1 right?

2 Q. Yeah. Let me just read it, and you tell me if this sounds
3 familiar.

4 At the discretion of the Retirement Committee, an
5 option may be added to the Watch List for people, process,
6 and/or performance reasons.

7 Is that what you're referring to?

8 A. That's correct.

9 Q. Okay.

10 A. The information ratio was a tool.

11 Q. I'm not suggesting anything other than that.

12 A. Okay.

13 Q. Okay. Gross performance refers to the performance of the
14 fund before the expense ratio is applied, right?

15 A. Yes. Before the expense ratios for the various share
16 classes are applied to the funds, correct.

17 Q. Okay. And it makes sense to tie Investment Team
18 compensation to gross performance because the Investment Team
19 doesn't have any control over the expenses, correct?

20 A. I don't know. I don't have -- I'm not part of those
21 conversations.

22 Q. Do you know who said --

23 A. But fundamentally.

24 Q. Do you know who at American Century determines what the
25 expense ratio is going to be for each of the funds?

1 A. Do I know how they do that?

2 Q. No. Do you know who is responsible for that?

3 A. Who is responsible. I do not know who is responsible
4 specifically.

5 Q. Okay. Fair enough. It's fair to say that an investor in
6 a mutual fund would never realize gross performance as their
7 return on the investment, right?

8 A. I'm sorry. I don't agree with that statement. An
9 investor could very possibly earn well beyond the gross
10 performance because of performance itself. I mean, funds are
11 supposed to earn their investment fees, right, and over time
12 outperform.

13 Q. Sure. But they're never going to get -- they're always
14 going to have a fee charged, right?

15 A. There is a fee for investment management business, yes.

16 Q. Okay. Yes. So when you're measuring performance based on
17 gross performance, you're not actually measuring the return
18 that an investor gets who invests in one of these funds?
19 You're measuring the return before the fees are deducted,
20 right?

21 A. Well, that's -- I -- you know, I'm going to get lost in
22 the language that you're using versus the language that I'm
23 using.

24 Q. If there's a better way, better language to use, help me
25 out.

1 A. So investors pay a fee for an investment vehicle. Much of
2 the time, the mutual funds -- or all the time, mutual funds,
3 it's taken out of the return before the return is recorded, or
4 reported rather to that investor.

5 Q. The investor always --

6 A. In the institutional world, right?

7 Q. Right. The investor always has to pay that fee?

8 A. Well, I don't know that the investor always pays the fee.

9 Sometimes the plans pay the fee and --

10 Q. How about this.

11 A. Yeah.

12 Q. No one gets an American Century fund, a fee-free American
13 Century fund, right?

14 A. I believe there were money market funds that --

15 Q. Ah.

16 A. -- American Century waived the fees on related to those
17 funds. So, amazingly, I'm going to have to say no.

18 Q. Aside from the money market funds, no one gets a fee-free
19 investment in an American Century product, right?

20 A. Generally not.

21 Q. Okay. So the investors do pay -- or do get the net
22 performance, not the gross performance on their investment,
23 right?

24 A. Yes. Many times which outperform the fee and the
25 benchmark. If -- what are you comparing it to? Just gross to

1 net?

2 Q. I'm not comparing it -- I'm not comparing it to anything.
3 I'm just trying to make this point clear on the record here
4 that the investors -- the performance that they actually
5 realize is the net performance of the fund --

6 A. Yes.

7 Q. -- not the gross performance?

8 A. Yes.

9 Q. You would agree with that, right?

10 A. I would agree with that.

11 Q. Okay. Let's go back to JX 54. This is the Investment
12 Policy Statement again. And, Karla, can you take us to page
13 15, Appendix A?

14 Do you see here listed the core investment options
15 in the Plan and then the index or peer group for each of those
16 options?

17 A. Yes.

18 Q. Okay. And then flip ahead, Karla, to the last page. Can
19 you blow up the box on the bottom?

20 So we're looking at the change in methodology going
21 from -- or being a benchmark methodology in connection with
22 the change to the -- the way the benchmark was being
23 addressed. Here, we also have a reference to a peer group
24 comparison rather than a -- versus a passive benchmark. Do
25 you see that?

1 A. I do.

2 Q. So in some instances, you're looking at comparison to a
3 benchmark. In other instances, you're looking at comparison
4 to a peer group. Is that fair?

5 A. That's what this says, yes.

6 Q. Okay. And this peer group methodology, it says that the
7 peer groups chosen by the Retirement Committee are the same
8 peer groups used by American Century Investment Management's
9 (ACIM) Investment Oversight Committee.

10 Do you see that?

11 A. I do.

12 Q. So whether we're talking about the benchmark methodology
13 or the peer group methodology, in both instances, the
14 Retirement Committee is relying on methodologies that the
15 mutual fund company has developed; is that fair?

16 THE COURT: Well, it said --

17 THE WITNESS: I'm trying to --

18 THE COURT: It says Morningstar and Lipper.

19 THE WITNESS: Yeah. I mean, if you look on, it says
20 they're based on Morningstar and Lipper universes. But in
21 some cases, it might be adjusted for some -- I mean, I'm --

22 Q. Right. I'm not suggesting that they're generating all
23 that data themselves. They're going out and getting it from
24 other sources like Morningstar and Lipper, right?

25 A. Right.

1 Q. And by "they," I'm talking about the mutual fund company,
2 right?

3 A. Yes.

4 Q. Okay. And to the extent that the Retirement Committee is
5 relying on these -- this peer group comparison, you're using
6 the same peer groups used by the mutual fund company, right?

7 A. Not without having considered it as an appropriate peer
8 group. The Retirement Committee would have had to have that
9 conversation. There's no way that we would have just outright
10 adopted something that we didn't believe --

11 Q. Okay.

12 A. -- was a reasonable measure for a peer group.

13 Q. Whether it's the peer group methodology or the benchmark
14 methodology, in both -- under both of those methodologies,
15 you're using the same metric that the mutual fund company
16 uses, right?

17 MR. FALVEY: Objection, asked and answered.

18 THE COURT: Overruled. I mean, this is -- I'm not
19 sure -- this is very hair splitting, but are you just asking
20 where she got the -- where she -- if she knows where they got
21 this information or --

22 MR. SPECHT: No. I'm just trying to establish the
23 point that the metrics that the Retirement Committee is using
24 are the same metrics that the mutual fund company is using for
25 the Watch List. That's all.

1 THE COURT: Do you agree with that?

2 THE WITNESS: I think they're similar from an
3 algebraic perspective looking at performance. I don't know
4 what the mutual fund company specifically did as it related to
5 the qualitative pieces, where the Investment Committee had a
6 mandate to also look at the qualitative pieces of the
7 investments as they related to this Plan for the participants.

8 THE COURT: And you also just testified,
9 Ms. VanWagoner, that there's that little tail related to
10 information ratios, right?

11 THE WITNESS: Yeah.

12 THE COURT: You're looking at other things as
13 well --

14 THE WITNESS: Absolutely.

15 THE COURT: -- in your role other than information
16 ratios and the Watch List. But that's all part of the metrics
17 that the Committee's tasked with --

18 THE WITNESS: Right. It's --

19 THE COURT: -- in the evaluation of this core
20 investment option?

21 THE WITNESS: Right. The investment -- the
22 information ratio was the tool that was used. Peer groups are
23 another tool that is used in establishing --

24 THE COURT: Yeah.

25 THE WITNESS: -- Watch List criteria and longevity

1 and whatnot. But also looking at, you know, the people that
2 are investing those assets, those individual portfolio teams,
3 their process, any changes they're in. And, most critically,
4 the market itself and what was happening in the market related
5 to that particular fund versus its basic measures.

6 THE COURT: Mr. Specht, sir, you got about two
7 minutes.

8 Q. We talked -- or you talked a little bit on your direct
9 about the sophistication of the Plan participants. Do you
10 recall that?

11 A. Yes.

12 Q. You would agree that not every single person in the Plan
13 is a sophisticated investor, right?

14 A. Of course.

15 Q. Can we take a look --

16 A. But you don't -- you don't manage a DC plan based on the
17 lowest common denominator. You base your decisions on the
18 participant group as a whole and the characteristics of that
19 participant group. American Century's Retirement Plan was
20 focused on asset manager employees. They were very
21 knowledgeable about their strategies --

22 Q. Sure.

23 A. -- day in, day out.

24 THE COURT: Okay. Okay. Please proceed.

25 MR. SPECHT: I'm about to get into a new topic.

1 Should we take a recess?

2 THE COURT: Okay. We'll take a lunch recess for one
3 hour. Thank you all.

4 (Recess at 11:59 a.m. until 1:01 p.m.)

5 THE COURT: All right. Mr. Specht, do you have any
6 more questions?

7 MR. SPECHT: A few more.

8 THE COURT: A few more.

9 MR. SPECHT: A few more.

10 Q. Okay. Can we go to JX 16, page 33.

11 Ms. VanWagoner, you were asked about this document
12 in your direct testimony. Do you recall that?

13 A. Yes.

14 Q. This is the Expense -- Expenses By Investment Options for
15 the Plan as of February 28, 2011, right?

16 A. Yes.

17 Q. And just to make sure we're on the same page with how this
18 works, what's going on here is that for each investment option
19 in the Plan, we're being told what the expense ratio is for
20 that option, and then we're giving a percentile rank within
21 the peer group for that investment option, right?

22 A. Correct.

23 Q. And there's an indication of what the peer group is for
24 each one of those on the far right-hand column?

25 A. Yes.

1 Q. And I think you said in your direct testimony that you --
2 at the time you were receiving these reports, you understood
3 that the peer groups that were included here included all
4 share classes?

5 A. That's correct, as footnoted at the bottom of the page.

6 Q. As footnoted at the bottom. Right. Okay. And so the
7 effect of including all the share classes, we've heard quite a
8 bit of testimony about this, is that the more expensive share
9 classes -- and by more expensive, I mean more expensive than
10 the institutional share classes that we see reflected here --
11 all of those share classes are included in the universe -- the
12 peer universe, right?

13 A. To my understanding, yes.

14 Q. And so that's going to have a tendency to make these
15 inexpensive institutional share classes that American
16 Century's listing here, it's going to have a tendency to make
17 those look better from a cost perspective, right?

18 A. Not necessarily. I mean, when you're looking at all share
19 classes, which is a standard thing to do, it's -- it would
20 definitely pile the cheaper ones to the top of the list and
21 the more expensive ones to the bottom of the list so --

22 Q. Fair enough.

23 A. But it depends on the asset class too.

24 Q. Okay. And you said it was a standard thing to do, but
25 it's actually called out in the footnote, right?

1 A. Yes.

2 Q. Okay. So it wasn't so standard that it didn't have to be
3 explained in the footnote?

4 A. Well, that's standard practice to source your data and the
5 compilation of the data.

6 Q. Uh-huh. But the footnote -- it could have been done
7 without all share classes, right? That's what the footnote is
8 telling you is that there's two different ways to do this and
9 here's how we did it?

10 A. No. It's --

11 MR. FALVEY: Objection.

12 A. -- just telling you that all share classes --

13 THE COURT: Sustained. It kind of sounds like we're
14 arguing about this --

15 MR. SPECHT: Sure.

16 THE COURT: -- Mr. Specht.

17 MR. SPECHT: Fair enough. I'll move on.

18 Q. So this chart does not tell you, as a member of the
19 Committee, how any of these American Century funds, the
20 institutional share classes of those funds, would compare to
21 the institutional share classes of the peer groups, correct?

22 A. Solely to institutional share classes, no.

23 Q. Okay. And this is from the time frame before we've got R6
24 or CITs. But when those come in later, the same would be
25 true, this same kind of chart wouldn't tell you how the R6

1 share class cost for the American Century fund would compare
2 to the R6 share class cost for the peer groups, right?

3 A. I don't know what they were using for peer group
4 comparisons when they had R6.

5 Q. That's after your time?

6 A. I think it was. I'm not sure.

7 Q. Okay.

8 A. I'd have to look at data.

9 Q. So -- but at least for your time on the Committee, that's
10 the case, right?

11 A. That the peer groups were all share classes, that's
12 correct, which was a standard practice in not only investment
13 management but in consulting.

14 Q. The costs for institutional share classes are public
15 information, right?

16 A. Yes.

17 Q. So, for example, we started out your -- my questioning of
18 you was this chart that had some of these other fund families.
19 You can go on the websites and find out what the costs are for
20 their, for example, Large Cap Growth Fund, institutional share
21 class?

22 A. Yes. You can research all of that information. The
23 problem is that there are hundreds and hundreds of share
24 classes that come up in these data basis. I believe this was
25 Lipper. Yeah. And deciphering that -- I think Mr. Bouffard

1 had mentioned -- is just a herculean task.

2 Q. Did you ever try to do that?

3 A. No. I never tried to --

4 Q. Did you ever ask anyone at the time to try to do that?

5 A. No.

6 Q. Okay. But if you wanted to just know, hey, how do we
7 compare to Dodge & Cox, Fidelity, PIMCO, T. Rowe Price, you
8 could have looked those up pretty easily, right?

9 A. It was all public data.

10 Q. Could we go back to the first page, Karla?

11 I just want to get a sort of -- give everyone a lay
12 of the land in terms of what's included in this report. So
13 this is the report, the materials that were included for the
14 meeting that occurred on April 6, 2011, right?

15 A. Yes.

16 Q. Okay. And, Karla, I just want to flip through the first
17 two pages.

18 So we start out with an agenda. And then we've got
19 the minutes from the prior meeting, right? The draft minutes?

20 A. Yes.

21 Q. And then we've got, it looks like, some draft minutes from
22 a special meeting?

23 A. Yes.

24 Q. And then -- keep going, Karla.

25 Then here we've got the Watch List -- listing of

1 what's on the Watch List and then what the methodology is,
2 right?

3 A. Correct.

4 Q. Okay. And next one.

5 And this is just an explanation for how information
6 ratio works, right?

7 A. Correct.

8 Q. Okay. And then here we start to get into the reports for
9 the funds that are on the Watch List. Karla, do you want
10 to -- yeah. Maybe just pull up that first one. I think it's
11 the Veedot.

12 So what you're given here -- and we talked about
13 this I think with some other witnesses -- is the gross return
14 for each fund, right?

15 A. Correct.

16 Q. And then some comparisons. So for the Veedot, we've got
17 the Russell 3000. That's the benchmark for that fund, right?

18 A. In this report, it is.

19 Q. In this report. And then the next thing in the line is
20 the calculation of the excess return as compared to the
21 benchmark, right?

22 A. Correct.

23 Q. And, again, that's calculating the return -- the gross
24 return, not the net of fees return, right?

25 A. That's correct.

1 Q. And then we've got the information ratio, right?

2 A. Yeah. That's on this line.

3 Q. And then we've got some data about how that compares to
4 peer groups, right?

5 A. Yes.

6 Q. So this doesn't tell you how the Veedot fund performed net
7 of fees, does it?

8 A. No, it does not.

9 Q. Let's back out, Karla.

10 And then this -- we can go through each one, but I
11 hope we don't have to, that's going to be true for every one
12 on here, right?

13 THE COURT: I hope we don't have to.

14 THE WITNESS: I would think no.

15 A. Yeah. I'm sure that's true.

16 Q. Okay. Great.

17 So let's flip ahead, Karla.

18 The next thing we see in here, these are the charts
19 that show the information ratios going back over different
20 time periods.

21 A. Uh-huh.

22 Q. Do you recall that?

23 THE COURT: Could you slow down just a little bit
24 for us?

25 A. Yes.

1 Q. Okay. And then, Karla, do you just want to flip -- keep
2 going.

3 So after we've gotten through those information
4 ratio charts -- why don't you blow this up, Karla.

5 And then, actually, this is going back and doing the
6 same thing we just looked at. So I wonder if this is maybe
7 just accidentally included a second time. We've got the
8 Veedot again. Does that look like a mistake to you
9 potentially?

10 A. I wouldn't know without comparing it to the other page.

11 Q. Okay. Well, we already saw the Veedot a minute ago,
12 right? And this is still Watch List funds?

13 A. We did. I didn't look at the date, but I -- you know,
14 if -- if it's a repeat, it's a repeat.

15 Q. Okay. That's fine. I agree with you on that. So let's
16 back out and go to the next page, Karla.

17 All right. Here we go. So now we're past, I
18 believe, the Watch List. And now we've got the reports for
19 everything else, all the other funds that are not on the Watch
20 List. Does that sound right?

21 A. I assume so, without looking at the Watch List.

22 Q. Okay. And in these reports, it looks like it's the same
23 format, so we've got gross return, right?

24 A. Yes.

25 Q. And then we've got the benchmark, right?

1 A. The benchmark used in this report, correct.

2 Q. Yep. And then we've got the excess as compared to the
3 benchmark, right?

4 A. Yes.

5 Q. The information ratio?

6 A. That's what I see.

7 Q. And then the peer group data?

8 A. That looks correct.

9 Q. So I think those are the same sort of metrics that we
10 looked at with the Watch List funds. Does that sound right to
11 you?

12 A. Yes.

13 Q. Okay. And again, this doesn't tell us the net return for
14 the Large Cap Growth Fund, right?

15 A. Not on this page, no.

16 Q. Okay. And it doesn't give any comparison of the net
17 return of the Large Cap Growth Fund to any other fund, right?
18 Any other Large Cap Growth Fund?

19 A. I'm sorry?

20 Q. This report does not give you any information about the
21 net return of the Large Cap Growth Fund compared to any other
22 fund, does it?

23 A. Well, Select and Ultra are both on here so --

24 Q. Okay. Any fund other than an American Century fund?

25 A. No.

1 Q. Okay. We can back out, Karla.

2 A. Just a peer group median.

3 Q. And then we can, I hope, just flip through and have an
4 agreement that that format of the information that's being
5 reported is the same for all the other funds in the Plan,
6 right?

7 A. That looks correct to me --

8 Q. Okay.

9 A. -- although --

10 Q. Oh.

11 A. -- I'm seeing a lot of INV, for investor share class, not
12 institutional share class. Is that just the way this report
13 was put together?

14 THE COURT: Could we get you to pull up closer to
15 the microphone?

16 THE WITNESS: Oh, sure.

17 THE COURT: And repeat that -- repeat that again
18 slowly.

19 THE WITNESS: Sure. So I'm seeing INV dashed after
20 most of these funds. And I thought I recalled at the time
21 that they were institutional share class, not investor share
22 class. But that could just be the way the report was put
23 together --

24 MR. SPECHT: Okay.

25 THE WITNESS: -- and that they are institutional

1 share classes.

2 Q. So separate from whether this is telling you about an
3 institutional share class or an investor share class, this is
4 telling you information about the American Century funds that
5 are in the Plan, right?

6 A. Yes.

7 Q. Okay. And whether it's telling you an investor share
8 class or an institutional share class, it's giving you gross
9 return, right?

10 A. Yes.

11 Q. And it's not giving you the net return, right?

12 A. No.

13 Q. No, it is, or no, it is not?

14 A. Oh, I'm sorry. No, it is not.

15 Q. Okay. Thank you. Keep going, Karla.

16 And as we're going through here, we're just flipping
17 through all the different asset classes and the funds that are
18 in the Plan for each asset class, right?

19 A. That's what it looked like, yes.

20 Q. Okay. So then this page is a little different. We've got
21 a -- some reporting of the performance of the American Century
22 stock price, right?

23 A. Yes.

24 Q. That's the -- the stock of the company American Century,
25 right?

1 A. Yes.

2 Q. Okay. So that's the company stock that is in some
3 people's portfolios?

4 A. Yes.

5 Q. Okay. Keep going.

6 This is the dividend yield for the American Century
7 stock, right?

8 A. It's showing the dividend yield for the last 12 months as
9 of that date compared to others.

10 Q. Okay. Keep going.

11 And then this is just some information about that,
12 right?

13 A. Yes. That's what it looks like.

14 Q. Now, we've got the chart that we talked about with the
15 expenses that we saw earlier?

16 A. Uh-huh. Yes.

17 Q. Keep flipping ahead, Karla, to page 38.

18 Page 38 gives you some information about assets that
19 are held in the Plan. And it looks like it's the investment
20 option utilization, right?

21 A. Yes. As of that date.

22 Q. Okay. And this is organized -- it's sorted by assets in
23 descending order, right?

24 A. Correct.

25 Q. So it's got the assets -- the fund that's got the most

1 assets at the top, and then the fund that's got the least at
2 the bottom, right?

3 A. As of that date, yes.

4 Q. Okay. And I think you said earlier you weren't sure about
5 the utilization for the equity index fund. This would
6 demonstrate that it was the 20th -- it's number 20 on the
7 list, right?

8 A. Yes. At 2.3 percent of the 100 percent.

9 Q. So the marks are probably not quite accurate, but 2.3
10 percent, 2.39, right?

11 A. It's really hard to read.

12 Q. Okay. Could we blow that up, Karla?

13 A. I have to find it again. 2.39.

14 Q. 2.39. All right. You want to back out, Karla?

15 And the biggest one is 6.25, right --

16 A. Correct.

17 Q. -- in terms of percentage? And then if we look at the
18 amount of money that's held in that fund, the average -- well,
19 let's start with -- blow up the equity index again, Karla.

20 So total assets are a little over 11 million, right?

21 A. That's correct.

22 Q. And then the column on the far right, this is an average
23 account column. Is that saying that the average participant
24 who has got this fund in their portfolio has \$37,000 and
25 change?

1 A. I think it's just the math between the eleven million one
2 and the 293.

3 Q. So that's the average balance for this fund?

4 A. Yeah.

5 Q. Okay. Let's back out, Karla. And then go to the next
6 page.

7 Similar information, but now we've got it -- the
8 funds in the Plan sorted by average account balance rather
9 than total holdings, right?

10 A. Yes.

11 Q. And on this one, I think the index fund is number 12. Do
12 you see that?

13 A. I do.

14 Q. And if we -- well, I don't think we even need to zoom in
15 on that. So that would indicate that if you're evaluating the
16 funds based on how much money does the average participant
17 have in a fund, then the index fund would have been the 12 --
18 number 12 on the list, right?

19 A. Yes. That's how the report is set up.

20 Q. Okay. So both of those metrics put it at least in the top
21 half, right?

22 A. By what measure?

23 Q. By the measure --

24 A. By both measures.

25 Q. By the measures that are being reported here?

1 A. Yes.

2 Q. Okay. Karla, let's just keep flipping through.

3 So we've got some other measures of the holdings.

4 We've got a fund transfer analysis. We have a pie chart
5 showing where things are at in terms of equity, cash. Keep
6 going. Assets by Morningstar class. Here we've got a little
7 bit more on the costs for these funds, right?

8 A. Yes.

9 Q. This chart is showing us for each fund in the Plan the
10 total expense ratio and then the amount that's going to
11 JPMorgan as a service fee, right?

12 A. Yes. The basis points.

13 Q. Okay. And nothing on here tells you that -- anything
14 about the net performance of any of these funds, right?

15 A. I'm sorry?

16 Q. Nothing on this table tells you anything about the net
17 performance of any of these funds, correct?

18 A. Not -- let me look. I don't believe so, no.

19 Q. Okay. Nothing -- sorry. Go back to that table.

20 Nothing there tells you about how the performance of
21 these funds would compare to any peers, right?

22 A. No.

23 Q. And nothing on this table tells you anything about how the
24 cost of the funds would compare to any peers, right?

25 THE COURT: You're going way too fast, Mr. Specht.

1 MR. SPECHT: I'll slow down.

2 THE COURT: That last sentence. Is there anything
3 you'd like us to do to Mr. Specht, Ms. McBride -- or
4 Ms. Lambrecht?

5 THE REPORTER: Not yet.

6 THE COURT: All right.

7 MR. SPECHT: Thin ice.

8 THE COURT: Don't mess with her.

9 MR. SPECHT: I won't. Should I repeat that?

10 THE COURT: Yes.

11 Q. Nothing in this table tells you anything about how the
12 costs of the funds compare to any peers, correct?

13 A. No. That wasn't the function of the report.

14 Q. Okay. Let's keep going.

15 We've got some disclosures, a trading summary,
16 fiduciary update. That doesn't, in this one, contain
17 anything. The notes. And then, I believe, if we continue
18 going through the rest of this, it's going to have these same
19 performance reports. And these are the same -- you can just
20 stop there, Karla.

21 These are the same sort of metrics we saw before.

22 Gross return, benchmark, information ratio, et cetera, right?

23 A. It looks to be, yeah.

24 Q. So, again, nothing here on the net performance of the
25 fund?

1 A. No.

2 Q. Nothing here on how the expenses would compare to any
3 peers, right?

4 A. That's not what the report was created for.

5 Q. Okay. But you agree that information is not here
6 nonetheless?

7 A. It is not there, no.

8 Q. Okay. And I believe we can just flip through to the end.
9 That will take us to the end of the document.

10 So, ma'am, the information provided to the Committee
11 for the meetings did not tell you what the net return was on
12 the funds in the Plan, did it?

13 A. No.

14 Q. And it also didn't tell you how that net return would
15 compare to any other fund that might be available on the
16 market, did it?

17 MR. FLECKNER: Objection.

18 THE COURT: Sustained. We've already been through
19 this, I think, and she said this isn't even the purpose of
20 this report so --

21 MR. SPECHT: Well, the point I'm trying to make,
22 Judge, is that the information that was given to the Committee
23 that they considered at the meetings doesn't include any of
24 this information. Whether it was the purpose of the report or
25 not --

1 THE COURT: Well, we're talking about a particular
2 report here. We're talking about JX 16. And we've been
3 talking about JX -- was it 13? You called -- you called JX 13
4 after lunch, right? This witness has just said, hey, you're
5 right, this information is not there, but that's not what she
6 felt like the purpose of this report was in the first place.
7 Correct, Ms. VanWagoner?

8 THE WITNESS: Not for many of the pages that he
9 cited. For the expense ratio page versus the universes, the
10 peer universes, that's what that report was intended for.

11 THE COURT: Okay. Okay.

12 MR. SPECHT: I think we're not on the same page,
13 Judge. And I can --

14 THE COURT: Okay.

15 MR. SPECHT: I'll move on after this but --

16 THE COURT: I'd like you to move on.

17 Q. All right. Well, I am trying to establish that this is
18 the materials that was provided to the Committee for this
19 meeting, right?

20 MR. FALVEY: Objection, Your Honor. This is one
21 report in a thick set of materials provided to the Committee
22 at this meeting.

23 MR. SPECHT: This is the entire document.

24 THE COURT: Well, hold on. Hold on. Hold on. Was
25 this the only document that was given to you in preparation

1 for this meeting that you know of?

2 THE WITNESS: I don't --

3 THE COURT: That you can recall? This was --

4 THE WITNESS: This looks like standard reporting for
5 an Investment Committee meeting.

6 THE COURT: You received a packet of documents
7 before the meeting?

8 THE WITNESS: Yes.

9 THE COURT: And I think -- I think it was
10 Mr. Cowherd who said -- who testified maybe a week before the
11 meeting, you usually got a packet of documents?

12 THE WITNESS: That's correct.

13 THE COURT: And sometimes was that packet of
14 documents supplemented from time to time before the meeting?

15 THE WITNESS: Yes.

16 THE COURT: Okay.

17 THE WITNESS: Depended what was on the agenda.

18 THE COURT: And what you looked through with
19 Mr. Specht is consistent with what you would have received as
20 part of that packet of documents?

21 THE WITNESS: Yes, as a standard agenda item. It
22 came in a book like this.

23 THE COURT: Would you get it in a binder like that?

24 THE WITNESS: Yeah.

25 THE COURT: Okay.

1 THE WITNESS: All of them.

2 THE COURT: So the lawyers are using the same
3 binders that you would use?

4 THE WITNESS: Yes.

5 THE COURT: All right.

6 Q. All right. And, if I may, that binder doesn't have any
7 information in it that tells you what the net return on the
8 funds was, does it?

9 A. No.

10 Q. Okay. And it doesn't tell you how that net return
11 compared to any other fund on the market, does it?

12 A. No.

13 MR. FALVEY: Objection.

14 Q. And it doesn't tell you --

15 THE COURT: Sustained. Sustained. She's answered
16 the question. She -- she said -- she said it doesn't have the
17 net return. I need you to move on. We're -- we're going in a
18 circle is what we're doing (indicating). And I want you to
19 move forward away from this circle, please.

20 Q. Your current employer is -- you testified on direct is the
21 advisor called DeMarche, correct?

22 A. Yes. That's correct.

23 Q. And one of the things that DeMarche does is provides
24 investment advice to retirement plans, correct?

25 A. Yes.

1 Q. And DeMarche has got a whole section on its website about
2 defined contribution plans, correct?

3 A. Yes.

4 Q. You're familiar with that -- that information on the
5 website?

6 A. Generally, yes. I don't have it memorized.

7 Q. Do you review it from time to time?

8 A. I -- yeah, occasionally.

9 Q. Have you written any of the information that's on that
10 website?

11 A. No, not directly.

12 Q. In the times that you've reviewed it, have you ever seen
13 anything that you've disagreed with?

14 A. On the DeMarche company website?

15 Q. Correct. I'm talking about the website specifically
16 related to the services that you provide to defined
17 contribution plans.

18 A. Not that I recall.

19 THE COURT: Drum roll please, Mr. Specht.

20 THE WITNESS: Yeah. Right?

21 THE COURT: What is this?

22 Q. One of the things that DeMarche talks about on its website
23 as it relates to defined contribution plans is the fact that
24 historically defined contribution plan sponsors have not
25 exercised the same level of due diligence that defined benefit

1 sponsors would have exercised. Do you recall that?

2 MR. FALVEY: Objection. Hearsay without reference
3 to the document.

4 THE COURT: Yeah. This is not -- this is not going
5 to be anything I'm going to make a decision about in this --
6 Listen, the judge has entered the pushy mode. I need you to
7 move on or -- like I said, if we're not being productive in a
8 way that's helpful, I'm going to -- you're not going to be
9 able to ask more questions. And I know that's offensive, but
10 that's the way I do this, especially in bench trials. So I
11 encourage you to find good questions to ask this witness.

12 MR. SPECHT: Fair enough, Judge. One more question
13 about the website and I'll move on.

14 MR. FALVEY: Your Honor, if I may, in addition --

15 THE COURT: The website is not relevant to anything
16 I'm doing here. And -- I'm sorry. Go ahead, Mr. Falvey.

17 MR. FALVEY: I was going to say, Your Honor imposed
18 a protocol at the outset that we've been following about
19 exchanging binders and material beforehand. I don't see
20 anything this -- among the documents.

21 THE COURT: That's even worse. That's even worse,
22 Mr. Specht. I didn't expect this from you. Is there anything
23 about this in the binder that you gave Mr. Falvey?

24 MR. SPECHT: It's not -- it's not an exhibit. I'm
25 asking her about the website --

1 THE COURT: Yeah.

2 MR. SPECHT: -- for her company.

3 THE COURT: We're not going to explore the website.

4 So I'm not going to allow any questions about the website.

5 MR. SPECHT: Fair enough.

6 Q. Ma'am, would you agree that one of the areas in which

7 DeMarche adds value for its client is its manager search

8 process?

9 A. Yes.

10 Q. And the manager search process, that refers to searching
11 for an investment manager, generally within a particular asset
12 class?

13 A. Yes.

14 Q. That would include looking at a number of different asset
15 managers, for example, the ones we had on our list, Fidelity,
16 PIMCO, T. Rowe Price, et cetera?

17 A. It would depend on the asset class and the research work
18 that was done by the research team.

19 Q. So depending on the asset class, it could include some of
20 those names?

21 A. Potentially.

22 Q. Okay. Have you done manager searches that involved those
23 asset managers?

24 A. I probably have in the past, but I couldn't tell you
25 specifically which strategies today.

1 Q. DeMarche's manager search process that it goes through in
2 looking at different asset managers leads to better outcomes
3 for plan participants in terms of costs, right?

4 THE COURT: Mr. Falvey?

5 MR. FALVEY: Objection.

6 THE COURT: What's that -- why?

7 MR. FALVEY: Time frame that we're in now, you know,
8 2018, with DeMarche, I just don't think it's relevant to
9 anything we've heard from the witness on direct.

10 THE COURT: How is this relevant to our inquiry,
11 sir?

12 MR. SPECHT: Well, it goes into how you go about
13 finding a fund manager and the benefits of an asset manager
14 search in terms of a number of factors.

15 THE COURT: I mean, this sounds like a -- it sounds
16 like a place I don't want to go. I'm going to give you like
17 one more question to make this seem like it's going to be
18 relevant to my -- how is this relevant to my determination
19 about prudence and those issues before the Court?

20 MR. SPECHT: I think it goes to the heart of all of
21 those issues as it relates to limiting your plan to a single
22 fund family.

23 THE COURT: Mr. Falvey?

24 I'm inclined to ask Mr. Specht to respectfully just
25 sit down after that question.

1 MR. FALVEY: Your Honor, I would just say the
2 testimony is uniform that the Committee inherited a lineup.
3 It scrutinized the lineup to make sure it complied with the
4 investment selection criteria and monitored accordingly and
5 would only have to go to a manager outside or think about
6 different management if the fund was not meeting its -- its
7 role in the lineup. And since this witness has said that
8 never happened, I think the parameters in another context of
9 investment manager search just don't have relevance.

10 THE COURT: I need you to sit down, Mr. Specht.
11 This is -- we're just kind of spinning our wheels here. This
12 is not inquiry I think that's appropriate or helpful to me in
13 making this decision.

14 The last two subject matters, I -- the website and
15 DeMarche's role in all this, I'm sorry, I think you're off,
16 and I need -- I need you to be finished.

17 MR. SPECHT: Well, Your Honor, respectfully, the
18 inquiry about how these plans are run turns on the universe
19 of --

20 THE COURT: How DeMarche runs -- how -- what
21 DeMarche does, that's not what -- what we're hearing here. Is
22 that even your role to work for DeMarche and select fund
23 managers?

24 THE WITNESS: I participate on the side of the Plan
25 sponsor to help facilitate the process.

1 THE COURT: And so you do communicate about those
2 things from time to time?

3 THE WITNESS: I do.

4 THE COURT: Okay. I'm going to give you just
5 another question. Just ask your best question, and then
6 please sit down.

7 MR. SPECHT: Your Honor, I can move on from the
8 DeMarche stuff altogether.

9 THE COURT: Well, I mean, if we go to another
10 subject, we're just wasting time here, in my opinion.
11 Let's -- let's -- Mr. Specht, what's your next subject matter
12 going to be about? Could you tell me first?

13 MR. SPECHT: Yeah. My next subject matter, Your
14 Honor, is going to be to go to JX 46, which is one of the
15 these reports that has the fund lineup --

16 THE COURT: Yes, sir.

17 MR. SPECHT: -- and ask her some questions about
18 that. I'm done with DeMarche.

19 THE COURT: About -- about American Century's fund
20 lineup?

21 MR. SPECHT: Correct.

22 THE COURT: Okay.

23 Q. So, Karla, if we could go to JX 46, page 87.

24 This is a style box that we've seen with a number of
25 the other witnesses in this case and it includes in each box

1 the different funds in the Plan. Does that look right to you?

2 A. Yeah. It says the data is as of August 31st of 2016. I
3 wasn't on the Committee.

4 Q. Okay. But you recognize the format of this in terms of a
5 style box and the funds that are in the Plan in each box?

6 A. I recognize style box comparisons. I couldn't speak to
7 the funds in the Plan. I have to assume that this is
8 accurate.

9 Q. Okay. Many of these are funds -- Karla, let's just zoom
10 in on the top left one. Many of these are funds that were in
11 the Plan while you were a member of the Retirement Committee,
12 correct?

13 A. That looks correct.

14 Q. Okay. And for each style box that we have here, if the
15 Committee had looked outside of the American Century fund
16 family, in many of these boxes, they could have found lower
17 cost, better performing funds, correct?

18 MR. FALVEY: Objection, Your Honor.

19 THE COURT: I don't -- you can answer the question.
20 Overruled.

21 A. It depends on time frame. It depends on market activity
22 and how these funds were performing in that period of time.
23 So maybe. But, again, it's -- really, it depends on time
24 frame.

25 MR. SPECHT: Thank you. No further questions,

1 | Judge.

2 THE COURT: All right. Mr. Falvey.

3 MR. FALVEY: You know, I do have just a couple. Can
4 I be heard from this microphone?

5 THE WITNESS: I can hear you.

REDIRECT EXAMINATION

7 | BY MR. FALVEY:

8 Q. Just a couple of questions on adoption of the information
9 ratio as the metric. And you recall you were asked a series
10 of questions about the adoption in 2009 and 2010 of that
11 metric. Did anyone from outside of the Retirement Committee
12 influence the Retirement Committee's thinking on whether that
13 metric should be adopted?

14 | A. No.

15 Q. Was Lisa Lattan present at each of those meetings in 2009
16 and 2010 as secretary?

17 A. To my recollection, yes.

18 MR. FALVEY: That's all I have.

19 | THE COURT: All right. Anything else, Mr. Specht?

20 MR. SPECHT: No, Your Honor.

21 THE COURT: All right. Thank you. Thank you,
22 Ms. VanWagoner.

23 | All right. Please call your next witness.

24 MR. FALVEY: Defense calls Diane Gallagher.

25 THE COURT: Ms. Gallagher.

1 Ms. Gallagher, yes, you know.

2 DIANE MARY GALLAGHER, DEFENDANTS' WITNESS, SWORN

3 THE COURT: Please have a seat, Ms. Gallagher.

4 Welcome to you, Ms. Gallagher. You've been -- you've been
5 here every day, haven't you?

6 THE WITNESS: I have.

7 THE COURT: Yeah. Please begin, ma'am, by speaking
8 your full name, and spell your last name for us.

9 THE WITNESS: Sure. Diane Mary Gallagher.

10 It's G-A-L-L-A-G-H-E-R.

11 DIRECT EXAMINATION

12 BY MR. FALVEY:

13 Q. Good afternoon, Ms. Gallagher.

14 Thank you, Your Honor.

15 Ms. Gallagher, you're the last member of the
16 Retirement Committee, the last fact witness we're going to be
17 presenting in the case. You're the anchor leg. You've got
18 the baton. Is there anything we haven't heard? No, I -- I --

19 THE COURT: That's my question, Mr. Falvey.

20 MR. FALVEY: I know. I'm going to unbundle that
21 just a bit, Your Honor.

22 Q. Ms. Gallagher, you have been sitting at counsel table
23 throughout, correct?

24 A. Correct.

25 Q. Listening attentively to the testimony?

1 A. Correct.

2 Q. Passing notes to the lawyers?

3 A. Yes.

4 Q. Are they getting -- are they executing on anything?

5 A. They're doing great.

6 Q. Tell us what you do at American Century, Ms. Gallagher.

7 A. I am a vice president of client marketing at American
8 Century.

9 Q. And for how long have you been there?

10 A. This time, I've been here six years.

11 Q. Is this your second round at American Century?

12 A. It is.

13 Q. How do you describe your specialty, Ms. Gallagher?

14 A. For my career, I have been focused on participants'
15 communications and education in retirement plans.

16 Q. Do you sometimes refer to yourself as a retirement plan
17 design specialist?

18 A. Yes. Occasionally.

19 Q. And what does that encompass?

20 A. Working with plan sponsors on the design features that
21 they should adopt or consider adopting that will -- are most
22 likely to help their participants save for retirement.

23 Q. Have you been on the Retirement Committee since 2014?

24 A. I have.

25 Q. And have you been a chair since 2017?

1 A. Correct.

2 Q. How were you lucky enough to obtain that role?

3 A. I looked up at the wrong time. No. I volunteered to do
4 it.

5 Q. Let's -- let me go back and ask about your educational
6 background and then your professional background before coming
7 to American Century. Tell us first about your education.

8 A. I graduated with a bachelor of arts from the University of
9 Detroit in 1989. It's now known as Detroit Mercy. And I
10 worked for a large teaching hospital in Detroit, Michigan,
11 doing public affairs and employee communications until I moved
12 to Kansas City in 1994.

13 Q. And in 1995, did you join American Century?

14 A. I did. It was Twentieth Century then, yes.

15 Q. All right. And which part of American -- sorry, which
16 part of Twentieth Century did you join?

17 A. I joined the communications team in the recordkeeping
18 business.

19 Q. So at that time -- and we've heard this once before --
20 Twentieth Century had a recordkeeping function --

21 A. Correct.

22 Q. -- which it subsequently sold to JPMorgan?

23 A. Correct.

24 Q. What did you do from 1995 forward until that record- --
25 the recordkeeping function was sold in the recordkeeping area?

1 A. I developed employee communications materials for the
2 employees of our client companies about their retirement
3 benefits. So writing about how important it is to save for
4 retirement, what was available in their plans, communicating
5 plan changes.

6 Q. And what happened -- let's see. In what year did
7 American -- did Twentieth Century sell the recordkeeping
8 business to JPMorgan?

9 A. 2003.

10 Q. And what did you do then?

11 A. I largely continued a similar role. I was managing a team
12 of folks who did that work.

13 Q. So did you move over to JPMorgan with the business?

14 A. I did.

15 Q. And that was in 2003?

16 A. Correct.

17 Q. For how long did you stay at JPMorgan?

18 A. Until 2012.

19 Q. Where was that JPMorgan recordkeeping business located?

20 A. In -- here in Kansas City.

21 Q. Okay. And in 2012, what happened professionally for you?

22 A. I had the opportunity to return to American Century.

23 Q. And was that because JPMorgan had different ideas for you?

24 A. The next career opportunities for me at JPMorgan required
25 a relocation, most likely to New York. And my husband and I

1 wanted to stay in Kansas City. So I made a resolution to work
2 for a company headquartered in Kansas City.

3 Q. And -- and what did you do then in 2012?

4 A. I rejoined American Century in the defined contribution,
5 so the retirement plan business, to add some expertise around
6 participant experience and communications in retirement plans.

7 Q. So about 15 years of your career, before you came back to
8 American Century, you were part of the recordkeeper part of
9 investment management and retirement plan management, correct?

10 A. Correct.

11 Q. And can you describe, broadly, your role in -- in the
12 recordkeeping function during, say, the latter part of that
13 period as you -- as you came to more senior roles?

14 A. Sure. I continued to do different types of projects
15 working with large clients. In 2007, I was named head of the
16 participant communications and education department, was about
17 75 people that I had responsibility for.

18 Q. And -- and then you came to American Century. And what
19 group were you in in American Century when you rejoined in
20 2012?

21 A. I was in the defined contribution investment only
22 business.

23 Q. Okay. And what title did you have there?

24 A. Vice president of practice management.

25 Q. Could you describe basically the functions that you've had

1 from 2012 forward to the present as part of the defined
2 contribution business?

3 A. Sure. I would work with our client facing organizations
4 to add additional content, papers, presentations around
5 participant saving behaviors. One of the -- the key parts of
6 my responsibility over the last six years has been sponsoring
7 a national survey of retirement savers and sharing those
8 findings and presentations, collateral, et cetera, and what
9 people across the country think about saving for retirement.

10 Q. As part of your job, have you stayed current on trends in
11 retirement plan management over time?

12 A. Yes.

13 Q. And what do you do to stay current?

14 A. In addition to -- to following all of the sort of industry
15 publications and sources, I attend conferences. I talk with
16 colleagues from -- from peer organizations and just continue
17 to -- to participate in webcasts just to stay on top of the
18 industry.

19 Q. As part of your -- your roles both at JPMorgan and then at
20 American Century, have you from time to time attended
21 fiduciary committees overseeing plans that are comparable to
22 the Retirement Committee that you're sitting on now?

23 A. Yes, I have.

24 Q. And how many times have you had occasion professionally to
25 appear at other retirement or investment committees?

1 A. Several dozen.

2 Q. And just what's the nature of your appearances at
3 retirement committees?

4 A. I was either presenting a communication strategy or
5 recommendation for a plan that was making changes, or I was
6 sharing the results of our national survey with committees.

7 Q. Did you participate in give and take with committee
8 members at those dozens of meetings?

9 A. Yes.

10 Q. And was that kind of part of your job both at JPMorgan and
11 then later at American Century?

12 A. Yes.

13 Q. Has it been part of your role at American Century to
14 present in various forums, to take on speaking engagements?

15 A. It has.

16 Q. And what has been that part of your role?

17 A. I am a spokesperson at industry conferences and client
18 meetings as well as with industry reporters.

19 Q. What are some of the large industry conferences that
20 you've presented at?

21 A. Institutional Investor, Pensions & Investments, 401(k)
22 Summits, and the National Association of Plan Advisors.

23 Q. And you just mentioned several institute -- several
24 industry associations. Where do those rank in terms of size
25 and prominence within the investment and retirement plan

1 industry?

2 A. Institutional Investor particularly serves really the
3 largest defined contribution plans in the country. Those
4 employers make up that audience. The National Association of
5 Plan Advisors is the largest gathering of retirement plan
6 consultants. Annually, about 1,200 people every spring.

7 Q. And when you're presenting at those sorts of conferences,
8 what's the size of the audiences you're typically presenting
9 to?

10 A. It could be anywhere from 25 to 30 to several hundred.

11 Q. What -- what types of specific topics do you tend to
12 present on?

13 A. The main topic I present on is related to participant
14 behavior with respect to retirement savings.

15 Q. Let's pull up DX 738, please, Chris.

16 Do you recognize this -- the face -- this is a face
17 page of a presentation, correct?

18 A. Yes.

19 Q. And it's a PowerPoint deck that's behind this?

20 A. Yes.

21 Q. Do you recognize the specific presentation and can you
22 describe what it is?

23 A. I do. It is the presentation I delivered at the P&I
24 401(k) Conferences about our national study called "Who's in
25 the Driver's Seat."

1 Q. And what's the answer? Who's in the driver's seat? And,
2 actually, I'll actually ask, what's meant by that, the
3 driver's seat of what?

4 A. It's -- it's really what participants are looking for in
5 terms of who's driving their decisions around saving for
6 retirement.

7 Q. And why is this a topic that's of interest to the -- the
8 investment professionals, the retirement plan professionals
9 who are -- who are attending your talks?

10 A. Because there's so much discussion about decision making
11 with respect to saving for retirement. Preserving choice for
12 employees, for participants, and also making certain that
13 employers are putting forward sort of the best path for people
14 to make the decisions about saving. So it's a balance.

15 THE COURT: What year is this?

16 THE WITNESS: This would have been 2016.

17 THE COURT: Okay.

18 Q. And you know that from memory --

19 A. Yes.

20 Q. -- because you were at some of these -- in some of these
21 cities?

22 A. Yes.

23 Q. Did you present in one or more of these cities on this
24 topic?

25 A. I did, yes.

1 Q. I'm going to pick my best slide, taking some of the
2 judge's cues -- or at least a slide. Let's go to page 19,
3 please. A new graph. It doesn't actually relate specifically
4 to American Century, but can you tell us what is conveyed on
5 this slide that says, Plan sponsors still underestimate how
6 much participants want? What are you conveying with this set
7 of data?

8 A. Right. What this has shown over the years -- and I'm
9 going to correct myself. This was actually 2015. I'm sorry.
10 I'm now looking at the -- the dates.

11 What participants are saying is they want at least a
12 slight nudge, if not a strong nudge from their employers in
13 terms of telling them how much they should be saving and how
14 they should be preparing for retirement.

15 Q. So you've got four not very scientific sounding categories
16 here that go from a kick in the pants on the left, strong
17 nudge, slight nudge, leave you alone. Do I read that right?
18 A. That's correct.

19 Q. And then the bar graphs are telling you for particular age
20 groups how people are responding and how much direction they
21 want in terms of their savings and investment behavior in
22 Plans?

23 A. Correct.

24 Q. Is that the idea?

25 A. Correct.

1 Q. And what's the -- what's the data base that you're drawing
2 from here?

3 A. It is the --

4 Q. Is it American Century data or other data?

5 A. No. It is a national sample. We work with a firm called
6 Greenwald & Associates in Washington, D.C. They do a lot of
7 work with respect to employee benefits. So it is a national
8 database that mirrors the U.S. consumer population.

9 THE COURT: Green Wallet?

10 THE WITNESS: Greenwald.

11 THE COURT: Wald.

12 THE WITNESS: G-R-E-E-N-W-A-L-D.

13 THE COURT: Thank you.

14 Q. And the specific question they answered with -- with this
15 chart is which best describes what you would like your
16 employer to do for you when it comes to encouraging you to
17 save more for retirement? Right?

18 A. Correct.

19 Q. And there's significant numbers over on the left and right
20 side of the -- of the charts, right?

21 A. Correct.

22 Q. So a bunch of people want a kick in the pants, right?

23 A. Yes.

24 Q. And a bunch of people want to be totally left alone,
25 right?

1 A. Yes.

2 Q. But is your point that actually more are in one of those
3 other categories of wanting some or a lot of nudge in the
4 right direction?

5 A. That's correct.

6 Q. And by nudge, what's being referred to?

7 A. It really does refer to the whole concept around automatic
8 programs. And we talked about automatic enrollment, automatic
9 savings increases, and re-enrollment. And that's really what
10 it speaks to.

11 Q. And is this data and research that's been done that you
12 speak on from time to time one of the things that informs how
13 you approach things on the Committee?

14 A. Yes. Absolutely.

15 Q. And do you bring that into conversations and the like?

16 A. Yes. It's --

17 Q. Okay.

18 A. -- what I think about.

19 Q. We can take that down. Thanks, Chris.

20 Is one of your jobs also at American Century to --
21 to appear in the media and sort of speak on behalf of the firm
22 in the media?

23 A. Yes.

24 Q. And can you describe that part of your job?

25 A. Yes. I am a designated spokesperson for the company with

1 respect to individuals and retirement savings.

2 Q. And what -- in what forums do you find yourself speaking
3 on behalf of the company?

4 A. Really, all of them. So I've appeared with local -- local
5 television -- local network affiliates, like local NBC
6 affiliate, for example, as well as our industry media, like
7 Ignites, 401kWire, Bloomberg Radio. I'm on at least once a
8 year Bloomberg Radio.

9 Q. So you're a -- you're a talking head for the firm on --

10 A. Yes.

11 Q. -- retirement plan matters?

12 A. Yes, I am.

13 Q. Do you also write on the topic -- topics?

14 A. Yes.

15 Q. What kinds of pieces do you write?

16 A. I will write -- often, I write the summaries of the
17 research that will go to our clients. I write content for our
18 blog about retirement savings as well.

19 Q. On top of your professional life that you described a bit
20 and your family life, are you involved in charitable
21 activities?

22 A. I am.

23 Q. Can you describe your major charitable commitments over
24 the past 10 years or so?

25 A. Sure. The primary involvement that I have is related

1 really to two organizations, Children's Mercy Hospital here in
2 Kansas City, as well as the Ronald McDonald House here in
3 Kansas City.

4 Q. And how did you get involved with the Ronald McDonald
5 House?

6 A. I -- one of my three daughters has very complex both
7 medical and developmental challenges. She's 18 now, and we
8 became involved with the organization because we used its
9 services when she's been hospitalized.

10 Q. And what have your roles been for the Ronald McDonald
11 House?

12 A. I served -- I'm currently on the advisory board. I was on
13 the board of directors for seven years and served as chair for
14 three of those years.

15 Q. And is that for the Ronald McDonald House in Kansas City?

16 A. In Kansas City, correct.

17 Q. What's -- what's your role been at Children's Mercy
18 Hospital?

19 A. I currently serve on the Hands and Hearts for Children
20 Auxiliary. I'm currently on the board and am co-chairing
21 their major single fundraiser this winter.

22 Q. And does that commitment also arise out of your family's
23 experiences?

24 A. Absolutely.

25 Q. Let's move forward to your role in the Retirement

1 Committee, Ms. Gallagher. We talked about your coming on in
2 June of 2014. Was there a particular incident or episode that
3 brought you on to the Retirement Committee?

4 A. When I rejoined the company in 2012, Julie Smith and Lisa
5 Benson -- the Committee at the time was looking for -- about
6 to do the recordkeeper change and the recordkeeper search.
7 And because I had been involved in so many presentations on
8 the other side as a recordkeeper, they asked if I would take a
9 look at some of the materials, if I would listen to some of
10 the presentations, think of other questions that hadn't been
11 asked. So I really focused in on what the recordkeepers are
12 saying about participant communications and what support they
13 would give us. So I had participated in an ad hoc basis for
14 that.

15 Q. And then you were asked to come on that following year?

16 A. And then -- correct.

17 Q. So you mentioned that you've attended dozens of other
18 committee -- sponsored committees over retirement plans. And
19 you've had some time on this Retirement Committee. What can
20 you observe about the quality of the composition and
21 discussion that occurs on the American Century Retirement
22 Committee?

23 A. It is a very animated group. When I look around the
24 table -- and I felt this the first meeting I attended -- there
25 are seasoned retirement plan and/or investment experts around

1 the room. And I really appreciated -- I was honored to be
2 part of the group. But I really appreciated the level of
3 consideration that took place in that group.

4 I know -- I think Margie Morrison made a comment on
5 Friday that we didn't -- we were -- we didn't talk as fast or
6 that we were -- and I think -- I'm going to disagree with her
7 because I think we talk over each other and very quickly and
8 very animated and passionate when we're together. It's a very
9 high caliber group of professionals.

10 Q. Does anybody listen?

11 A. Yeah. Yes.

12 Q. Sometimes when there's all talkers, no one is listening.

13 A. No. I do -- I follow Robert's Rules of Order and make
14 everyone stop talking.

15 Q. So people listen with consideration?

16 A. Absolutely.

17 Q. I haven't asked you about fiduciary training. Did you
18 have past experience as a fiduciary before coming on to the
19 Committee?

20 A. I was a fiduciary at Ronald McDonald House.

21 Q. Okay. And had you been dealing for decades with clients
22 who had fiduciary roles?

23 A. Yes.

24 Q. Had you indeed had the responsibility at a point in time
25 to write fiduciary materials?

1 A. Yes. I was the ghostwriter for our head of legislative
2 and regulatory affairs at JPMorgan. So I would interview him
3 and write materials on his behalf to share with clients.

4 Q. And he was a lawyer, so he needed somebody to do the
5 writing?

6 A. He wouldn't agree with that.

7 Q. But did you, nonetheless, when you received the fiduciary
8 toolkit coming on to the Committee, did you read it?

9 A. I did.

10 Q. And did you read it thoughtfully and closely?

11 A. Yes.

12 Q. How do you think about your fiduciary role in serving on
13 this Committee?

14 A. I take it very seriously and am very cognizant of the
15 gravity of the responsibility.

16 Q. And is there anybody you think of in particular when you
17 think about what you're doing on that Committee?

18 A. Yes.

19 Q. Who?

20 A. I think about my assistant. She's a single mom in her mid
21 forties, and I worry about her future. So I always think of
22 her.

23 Q. And does that affect your consideration of information
24 coming before the Committee, and does it affect your
25 discussion on the Committee?

1 A. It is certainly a -- a part of my consideration.

2 Q. You -- you've spent a lot of your time researching and
3 speaking on the participant perspective. Is that a role -- is
4 that a perspective you bring to bear on the Committee?

5 A. It is.

6 Q. Let me ask briefly about the Information Policy Statement
7 that I think all of the members of the Committee have been
8 asked about. Did you read it upon joining?

9 A. I did.

10 Q. Did you read the investment lineup upon joining the
11 Committee?

12 A. Yes.

13 Q. Did you think about that investment lineup?

14 A. I did.

15 Q. What did you think of the investment lineup?

16 A. I was already familiar with it when I joined the Committee
17 as I was a participant in the Plan. And it -- it looked as I
18 expected it would.

19 Q. Okay. Did you think about its appropriateness as a full
20 core lineup for this Plan?

21 A. Yes, I did.

22 Q. And what did you think about its appropriateness?

23 A. I thought it was a diverse array of choice for our
24 participants, knowing that, as we've talked about, we have a
25 sophisticated group of participants. So we had an array of

1 diverse choices covering the style boxes, as we've talked
2 about. So I thought it absolutely put forward the right
3 amount of choice.

4 Q. A moment further on, the IPS, had you reviewed the IPSs of
5 a lot of other retirement committees during your times at
6 JPMorgan and American Century?

7 A. Yes.

8 Q. What did you think of this IPS in terms of the degree of
9 guidance it provided and the degree of flexibility that it
10 provided?

11 A. I thought it was appropriate. And I think the most
12 important part in the Investment Policy Statement is that
13 there still remains some discretion for the Committee members.

14 Q. Before I shift to my next topic, Ms. Gallagher, I want to
15 touch back on that recordkeeper search that you were involved
16 in just before you came on to the Committee. The end result
17 of that RFP and selection process was that Schwab was chosen.
18 Was it chosen in connection with any other corporate
19 relationship that it might have had with American Century for
20 the time -- at the time?

21 A. No.

22 Q. And were you familiar with how it had competed on the --
23 on the relevant elements of the RFP that was being responded
24 to?

25 A. Yes.

1 Q. And how was it selected?

2 A. I think a couple of things beyond just -- just fees, the
3 per participant fee that Schwab was charging. From a
4 participant experience, which is my corner of the world, they
5 offered a very robust program for participants. Their website
6 was superior to others that we have looked at. So I thought
7 it certainly would support our participant base.

8 Q. And at the same time, it was coming in at the right price?

9 A. Correct.

10 Q. And indeed has dropped its pricing since?

11 A. Yes.

12 Q. The next thing I want to talk to you about, Ms. Gallagher,
13 is your and the Retirement Committee's priorities.

14 A. Uh-huh.

15 Q. I'm going to ask to pull up DX 511, please.

16 So this is the face page of the July 8th, 2015,
17 Retirement Committee minutes.

18 A. Yes.

19 Q. Let's see. Can you flip through the next couple of pages
20 slowly, Chris? Stop right there.

21 Do you recognize this as a Charles Schwab
22 presentation?

23 A. Yes.

24 Q. And it's dated July 2015, date of this meeting?

25 A. Yes.

1 Q. And it goes over July -- goes over 2018 [sic] to 2013
2 trends. Do you see that?

3 A. Yes.

4 Q. So I'm not actually going to ask about trends but
5 priorities. Let's go to page 4, please.

6 What's presented on this page of the Schwab
7 presentation?

8 A. These are kind of key themes or topic areas for plan
9 sponsors in terms of designing and running a 401(k) plan.

10 Q. Did these reflect, in your view, the priorities of --
11 appropriate priorities for a Retirement Investment Committee?

12 A. It did, yes.

13 Q. And in your view, are they in the -- at the -- the correct
14 order of priority, or would you -- would you have a different
15 ranking of priorities?

16 A. I would put them in this order.

17 Q. And I want you to just go through these one by one,
18 because -- you know, they're short PowerPoint topics. Just
19 explain briefly what each of these is and why you think it's
20 being placed here in the right order of priority?

21 A. Number one, plan design and feature adoption rates really
22 speaks to how the plan is structured, which really gives your
23 employees the best chance of -- of saving well for retirement.
24 So plan design comes really before anything else.

25 Q. And that includes features that you just -- like the ones

1 you just mentioned?

2 A. Correct.

3 Q. Automatic enrollment, automatic escalation and the like?

4 A. Correct.

5 Next we'll look at employer contribution levels,
6 because this is beyond the savings of the individual
7 participant of what the employer contributes as well. That's
8 all additive to a participant's retirement account.

9 Q. And --

10 A. So again --

11 Q. And this piece is the one piece that's not something that
12 you as a Retirement Committee can affect so much, but it's
13 very important?

14 A. Right.

15 Q. Correct?

16 A. But it's a sponsor consideration, correct. Correct.

17 Number three -- and this is really what I hone in
18 on -- related to participation and savings levels. So thing
19 one is to make sure that you have as many participants in the
20 plan as possible. But thing two is they have to be saving at
21 a high enough rate because nothing will make up for somebody
22 not saving enough. Nothing -- nothing solves for that. So
23 it's so important that a sponsor kind of deploys everything at
24 their fingertips to effect that -- that element.

25 And then number four, plan sponsor investment

1 decisions. So structuring a diverse lineup of choice, picking
2 the default, deciding whether or not to have a brokerage
3 window. All that goes into plan sponsor decisions.

4 Number five is then how the participants make their
5 own decisions.

6 And then number six, plan loans just really refers
7 to the idea that -- keeping the money in the plan. Don't use
8 your retirement account to buy Christmas presents. Leave it
9 saving for retirement.

10 Q. So this case is largely about -- plaintiffs' case here is
11 largely about the fourth issue, plan sponsor investment
12 decisions. Would you agree with that --

13 A. Yes.

14 Q. -- having sat through the trial so far?

15 A. Yes.

16 Q. And it's -- and it's one of -- there are six on the list,
17 but let's say it's one of five issues that you saw to
18 influence why you were on the Committee, correct?

19 A. Yes. Yes.

20 Q. And in your way of thinking, it's probably the third most
21 important of the tasks that the Retirement Committee is taking
22 on year to year to year to year?

23 A. Yes.

24 Q. Is that what I understand?

25 A. Yes.

1 Q. And -- and in -- in saying that, are you minimizing or
2 shirking your responsibility with respect to that -- with
3 respect to that task?

4 A. Not at all. It's just that the savings rates are so
5 important, and it's the thing that I worry about the most,
6 that -- that folks are saving as much as they can through the
7 Plan. Because, again, nothing -- nothing is going to make up
8 for the loss of time there. Nothing will make up for that.

9 Q. I asked you whether you reviewed the investment lineup in
10 its entirety when you came on. I want to ask you some
11 questions now about what are essentially the plaintiffs' big
12 three, as you've been listening to this case.

13 All proprietary lineup, length of lineup,
14 insufficient use of index funds in the Plan. All right. So
15 let's go one by one. First, all proprietary lineup. You took
16 note, I assume, when you came on to the Committee, that the
17 lineup was all American Century funds, correct?

18 A. Yes.

19 Q. Why were you comfortable with the investment -- investment
20 option lineup, the core lineup, given that that was the case?

21 A. Because we still had in the lineup diversity. Our
22 participants still had choice among asset classes. We were
23 able to fill the style box. So there was still plenty of
24 opportunity for diversification within that proprietary
25 lineup.

1 Q. And how did risk and risk awareness factor into your
2 thinking, if at all?

3 A. One of the kind of hallmarks of -- of our investment
4 management philosophy, which we talked about, is -- is a
5 sensitivity of risk and being risk aware. And, you know, as
6 has already been brought up, we are -- we've set the record on
7 the longest bull market. So we are operating in a unique
8 period.

9 And I spent -- in the fall of 2008, I sat with a
10 representative with a headset on for hours listening to calls
11 from people calling in saying my account is now worth half of
12 what it was last week and --

13 Q. And where were you such that you were in a position where
14 you were listening to that kind of conversation on a headset?

15 A. Because I was -- I was the head of the participant
16 communications and education department. I just went over to
17 the contact center and said I need to listen in. I want to
18 hear what people are saying so I could write any
19 communications we needed to write. I participated in calls
20 with plan sponsors to tell them what we were hearing from
21 participants.

22 Q. I'm going to talk about actively managed and passively
23 managed funds briefly in a little bit. Did that awareness of
24 risk and downside risk always play a part in your thinking?

25 A. Yes.

1 Q. And in evaluating this all American Century lineup, what
2 consideration did you give to the knowledge of these funds and
3 these portfolios and the portfolio teams?

4 A. Well, first and foremost was related to the access -- that
5 we had not only easy access, we had immediate access to
6 portfolio management. You know, we didn't have to wait six
7 months to get someone scheduled. We could get to them
8 quickly. So we had intimate knowledge. We had people on the
9 Committee like Margie Morrison when I joined the Plan -- when
10 I joined the Committee. Chris Bouffard before that. These
11 are folks who live and breathe with these products. So we had
12 that -- that institutional knowledge of the funds.

13 Q. So it's been asked -- and I've asked some witnesses --
14 didn't you have an obligation to go find the all star lineup?
15 Didn't you have an obligation to go find best in class funds
16 in each of those style boxes?

17 A. I can't take credit for this phrase, but it, I think,
18 summarizes this best. Best in -- in class is best in last.
19 We would constantly be running after whoever was number one
20 before. And there's no way to do that. And it -- it's using
21 a retirement plan to chase returns, buy high and sell low all
22 the time.

23 Q. When you say there's no way to do that, Mr. Specht, I
24 think, was making a point in cross-examination recently,
25 today, that you could actually go back and figure out who had

1 done best last year and the year before that and the year
2 before that. Why isn't that the right exercise?

3 A. Because then you're basically taking everyone's accounts
4 and just following -- you're just running after those returns
5 forever. It doesn't work for an individual investor. It
6 doesn't work for retirement savings.

7 Q. Does -- and in your experience, does last -- last year,
8 last three year, last five-year performance predict reliably
9 who's going to do best next year, three years, five years down
10 the road?

11 A. It doesn't. And -- and Margie Morrison I think showed the
12 periodic table, the quilt chart, that really showed that,
13 that, you know, if someone could predict that going forward,
14 he or she would not be working.

15 Q. Including Margie?

16 A. Including Margie.

17 Q. Okay. Let's talk about lineup length briefly. The lineup
18 had thirty-ish funds plus all the retirement -- target date
19 funds at the time --

20 A. Yes.

21 Q. -- that you joined?

22 A. Yes.

23 Q. What did you think of that lineup length?

24 A. Again, as a participant, I knew what the options were. It
25 looked as I expected. It was not the longest lineup I've ever

1 seen, nor the shortest. It was -- it was what I've seen. It
2 would be appropriate for a financial services organization.

3 Q. Had -- I think one other witness referred to this, and I
4 don't want to belabor. Had there been a trend over time and
5 were we at a point in time in a trend during this 2010 to 2018
6 time period?

7 A. Well, I'll go back a little bit, but I'll be fast. When
8 DC plans, defined contribution plans, first started, they
9 really were very short, three options, four options, looking
10 much more like the Thrift Savings Plan, the TSP. And then as
11 we came into the early '90s particularly, participants were
12 demanding choice. And the market was on a run in the '90s.
13 So many plans really ballooned from that period among in the
14 mid '90s. I personally probably wrote, I don't know, a
15 hundred communications to participants saying that XYZ fund
16 will be added to your plan in January. They just kept
17 ballooning to give participants more options. I think --

18 Q. And because you were at JPMorgan as --

19 A. Yes.

20 Q. -- the recordkeeper at the time, right?

21 A. Right.

22 Q. And it was the one sending the correspondence out --

23 A. Right.

24 Q. -- every time a new fund was going to be added to
25 somebody's --

1 A. Right.

2 Q. -- plan?

3 A. We had to let participants --

4 Q. And you were the one who got to write --

5 THE REPORTER: Excuse me.

6 THE COURT: Hold on. Hold on. Hold on. She's got
7 to write down everything you say.

8 Q. Someone had to write the letter to explain that to the
9 participants?

10 A. Correct.

11 Q. And the someone was you?

12 A. That was me.

13 Q. And you did this hundreds of times?

14 A. Hundreds of times.

15 Q. So you watched and participated in the growth of the
16 lineups?

17 A. I did.

18 Q. What were some of the longer lineups you've seen?

19 A. Sixty, seventy funds.

20 Q. And did we get to a point sometime after 2000 where people
21 started to reevaluate the longer is better syndrome?

22 A. It really started after the Pension Protection Act in 2006
23 when -- when target date funds were ostensibly blessed to be
24 defaults. We started to see lineups start to pull down a
25 little bit more. So we -- we kind of swung the pendulum from

1 having no choice to lots of choice and then starting to come
2 back to medium choice.

3 THE COURT: That was 2006, the Pension --

4 THE WITNESS: Protection Act.

5 THE COURT: -- Protection Act? Okay. Thank you.

6 Q. And was there also some behavioral research being done out
7 there on that topic that maybe too much choice confuses the
8 chooser?

9 A. Yes, there was.

10 Q. Okay. So during the time you've been on the Committee,
11 has it been a priority to think about whether we can trim the
12 lineup a bit?

13 A. It has been.

14 Q. Have you actually seen concerning evidence of participant
15 confusion that led to that effort?

16 A. No. We have not seen evidence of confusion. We are just
17 looking at it if there's an opportunity to tighten the lineup.

18 Q. One of the ways in which the lineup is allegedly too long
19 is its inclusion of several specialty funds, Global Gold, Real
20 Estate, Equity Market Neutral. Have you observed other plan
21 lineups during your time as recordkeeper, and have you seen
22 specialty funds on the lineups of other plans?

23 A. Yes.

24 Q. How many and how frequently?

25 A. The one I recall specifically writing communications about

1 was real estate, so plans adding a real estate fund.

2 Generally, the plans that have specialty funds have a few in
3 particular sectors. And they're -- my experience -- very
4 common with financial services organizations.

5 Q. So let's talk about active versus passive funds and the
6 Committee's approach to that issue during your tenure. When
7 you came on to the Committee, it had no index funds, correct?

8 A. Correct.

9 Q. And then it added index funds a year and a half, a year
10 and three quarters after you joined?

11 A. Correct.

12 Q. Was it appropriate in your view when you first looked at
13 this lineup that it didn't have any index funds and, if so,
14 why?

15 A. I thought it was appropriate. The lineup, again, was --
16 was well diversified. I was really focused on the addition of
17 automatic savings increases as I thought savings was the
18 number one thing we needed to address.

19 Q. So -- but costs are one important issue to think about,
20 aren't they? The fee levels?

21 A. They're one thing.

22 Q. Okay. And -- and you knew that index funds delivered, you
23 know, funds and access to the underlying portfolio at lower
24 fees, right?

25 A. Yes.

1 Q. So why did that not cause you to think, gee, we should
2 have index funds in the lineup immediately?

3 A. Again, I thought savings was the most important thing we
4 needed to address, was to get our -- our contribution rates
5 higher. And index funds -- we were not hearing a lot from our
6 participants. Index funds were still available on the -- in
7 the brokerage window. But I really wanted to make sure that
8 we got our savings increase implemented first.

9 Q. In 2016, in April, there was a decision to add the
10 Vanguard Index Funds to the lineup. Do you remember that?

11 A. I do.

12 Q. What was your view on adding index funds at that time?

13 A. I was probably a little agnostic about it, that -- that we
14 would add index funds, again, down the middle of the style
15 box, as Chat Cowherd shared on Friday. It wasn't requiring a
16 change to anything else, that I thought we should just go
17 ahead and add them then.

18 Q. In that same meeting, were you also -- it's in the
19 minutes, but were you also talking about the auto-escalation
20 and re-enrollment features that have been testified to?

21 A. Yes, yes.

22 Q. And was that something that actually you viewed to be more
23 important to long-term outcomes than index funds or not index
24 funds?

25 A. I did. That was my personal sense was that the

1 re-enrollment was very important and that we do the right due
2 diligence with the recordkeeper to get that done. And I saw
3 that as a bigger priority.

4 Q. I'll go to that re-enrollment in just a moment. You
5 mentioned brokerage window. There's been some criticism and
6 questioning about whether people going to the brokerage window
7 are incurring unduly high either transaction fees or
8 management fees on some of the choices there. Have you heard
9 that testimony?

10 A. Yes.

11 Q. And from your job on the -- or role on the Retirement
12 Committee, are you familiar with whether there are also some
13 very low fee options that are available through the brokerage
14 window?

15 A. There are. There are -- there are funds in -- through the
16 brokerage window that are available as low as three basis
17 points.

18 Q. And do you know whether there's a series of Schwab funds,
19 index funds --

20 A. Yes.

21 Q. -- that are available --

22 A. Yes.

23 Q. -- that are very low fee, along those lines?

24 A. Very low, yes.

25 Q. Okay. So let's talk about auto re-enrollment. Chat

1 Cowherd talked at length today about that. And by the way, I
2 didn't ask about members and who's who. Do you and Chat
3 Cowherd have a long track record running next to each other?

4 A. We do. We've worked together for about 22 years.

5 Q. And -- and do you come at things from a slightly different
6 vantage point, given your different roles?

7 A. Yes.

8 Q. In kind of a sentence, what's your angle? What's his
9 angle?

10 A. I think we have complementary angles. Chat, historically,
11 would consult with a plan sponsor. And I bring the
12 participant point of view. So he and I often work with
13 clients together covering both those angles.

14 Q. Okay. So let's -- let's talk about the re-enrollment
15 program, the feature. I think it's been well described. It's
16 coming online now, correct?

17 A. Yes.

18 Q. It was described to the Court. It sounds a little
19 paternalistic. Are you taking choice away from participants
20 when you put in place this automatic re-enrollment in target
21 date funds with the opt out feature?

22 A. We are actually creating an event that assures that our
23 folks who want choice are making a decision. And that's what
24 we're doing with the re-enrollment.

25 Q. And the folks who don't opt out and stay with the target

1 date, are they themselves, in effect, making a choice?

2 A. They are.

3 Q. And that choice is?

4 A. To -- to kind of turn the keys over to some element and
5 invest through the target date solutions.

6 Q. And from what you've studied over time, spoken about over
7 time, is that a good place for lots of the participant base to
8 be?

9 A. It is a good net for a lot of folks. And the distinction
10 I would make as well is even with a sophisticated investor
11 base, there's two elements. There's the sophistication and
12 investment knowledge, but there's also the time. So you could
13 have someone who's very engaged and knows everything but says
14 I'm never going to spend the time to monitor my investment.
15 So a target date solution is still appropriate.

16 Q. And people in your -- in your line of work talk about
17 inertia as an important thing to think about?

18 A. Yes.

19 Q. And does the -- does the auto re-enrollment feature help
20 inertia work in their long -- in the long-term interest of
21 anybody who's not paying attention?

22 A. It does. And that is a -- that's actually a conference
23 topic I've covered is how plans can use inertia to work for
24 the benefit of participants through automatic features,
25 creeping them up on how much they save and then doing an

1 investment re-enrollment that if they don't do anything, they
2 end up in a target date solution, which is, in most cases, a
3 more appropriate investment than left to their devices.

4 Q. And among the Plan features that are in place, would you
5 say that auto re-enrollment is kind of over in that strong
6 nudge category?

7 A. Yes.

8 Q. Maybe over even near kick in the pants?

9 A. A little bit.

10 Q. I'll bet you're aware that the various funds in the Plan
11 have different fee levels, right?

12 A. Yes.

13 Q. So we've well established most of them are American
14 Century funds, but some are higher fee, some are lower fee.
15 They're all going to be -- those who don't opt out are going
16 to be put down into the target date fund.

17 A. Yes.

18 Q. Do those tend to be lower fee or higher fee?

19 A. Lower.

20 Q. Potentially less profit over to American Century as this
21 becomes effected, correct?

22 A. Perhaps.

23 Q. How much discussion has that gone -- gotten at the
24 Retirement Committee?

25 A. None.

1 Q. Why not?

2 A. It's -- it's irrelevant to us.

3 Q. How is -- how is the -- you're in this opt out window,
4 right? You're in the four-week opt out window. And Chat
5 mentioned that you're halfway through it.

6 A. Yeah.

7 Q. And he also mentioned you-all kind of know what you'd
8 normally expect in terms of an opt out rate. And I forget
9 from my notes. Did he say you'd typically expect a 30-ish
10 percent opt out? Or what is your experience along those --

11 A. Yeah. My experience is it's 20 -- anywhere from 20 to 30
12 percent of folks will opt out. I --

13 Q. And so, typically, if you were like everybody else, you'd
14 expect in a year that there would be a lot of conformity to
15 that nice, smooth American Century glide path, right?

16 A. Yes.

17 Q. What are you actually finding now that you're in the
18 window?

19 A. The last I checked, we have about 40 percent opt out with
20 two weeks to go.

21 Q. Okay. So there will be more?

22 A. There will be more.

23 Q. So you're not going to conform to the usual numbers?

24 A. No.

25 Q. And that's because?

1 A. We have a sophisticated group, and we're -- we're kind of
2 forcing those folks to affirm those decisions.

3 Q. And you may have some sophisticated folks who are deciding
4 to stay in target date funds, right?

5 A. Yes.

6 Q. All right. But you're continuing to think about choice,
7 honor choice as part of your philosophy on the Committee?

8 A. Yes.

9 Q. And one final exhibit I want to put in front of you,
10 Ms. Gallagher. Can we see DX 862, please.

11 So a lot of colors, a lot of stuff up here. This is
12 not a document that you reviewed in the normal course. This
13 is something that we've created as a demonstrative in this
14 case, correct?

15 A. Yes.

16 Q. And can you describe for the Court what it is, please?

17 A. Yes. It's a timeline that shows along the bottom topics
18 or discussions that the Committee had had over the last eight
19 years. And the top, above -- above the year line shows
20 decisions that have been made over the last eight years.

21 Q. So it's discussion by subject below, and then
22 action/resolutions on the top, correct?

23 A. Yes.

24 Q. And there's a color coding and -- and a color coding
25 legend over on the right-hand side, right?

1 A. Yes.

2 Q. And do those color codes make an effort to -- to group the
3 topics of discussion and action by category?

4 A. Yes, they do.

5 Q. So what this -- what did you think this chart -- let me
6 withdraw that question.

7 It says, Selected Retirement Committee Deliberations
8 and Resolutions. Is this an effort to capture everything that
9 was discussed and everything that was done?

10 A. No. I would say these are milestones.

11 Q. There's a list at the bottom in fine print of the various
12 exhibit numbers that it was drawn from. Do you see that?

13 A. Yes.

14 Q. And have you actually spent the time to compare these
15 entries to the exhibit references to confirm whether this is
16 an accurate summary or not?

17 A. I have not.

18 Q. You have not. Did you -- did you flip through the book
19 on --

20 A. Oh, yes, yes. I'm sorry. Yes, yes.

21 Q. Okay.

22 A. I did go through those. I did check.

23 Q. And -- and did you review the entries here against the
24 minutes --

25 A. Yes.

1 Q. -- to determine whether they were accurate?

2 A. Yes.

3 Q. And is this an accurate set of excerpts from the Committee
4 minutes?

5 A. Yes, it is.

6 MR. FALVEY: I offer DX 862, please, in evidence.

7 MR. LUKAS: No objection, Your Honor.

8 THE COURT: Thank you. 862 is admitted.

9 (Defendants' Exhibit 862 admitted in evidence.)

10 Q. What does the -- what does the chart, the -- the
11 demonstrative illustrate in terms of how this Committee
12 operates from consideration to action?

13 A. I think it shows that there is consideration and debate
14 initially around kind of broad themes and topics. And there
15 is then some discovery and questions and investigation that
16 needs to happen after our initial discussions before we make
17 the final decision to implement.

18 Q. So there's a color code on here for yellow?

19 A. Yes.

20 Q. And -- and the legend tells us that's -- those are entries
21 relating to reduced lineup size?

22 A. Yes.

23 Q. And the first entry we see below the line is a discussion
24 in June of 2010 that this Hewitt study is coming online. Do
25 you see that?

1 A. Yes.

2 Q. Then there's an entry above the line for the removal of
3 some funds at the April 2011 meeting. Do you see that?

4 A. Yes.

5 Q. And then considerably later in time, more discussion in
6 2016, and then some removal of funds again in 2017?

7 A. Yes.

8 Q. And is that kind of the way the chart works, you can kind
9 of follow through thinking and action on various of the topics
10 that the Retirement Committee has taken on?

11 A. Yes.

12 Q. Let's just look at two quick more examples. Tan is the
13 auto-escalation entry?

14 A. Yes.

15 Q. What's the -- what does the chart show us there?

16 A. That there was a discussion of adding auto-escalation
17 starting in October of 2012.

18 Q. And it has continued through when?

19 A. It continued through 2015, the decision to add it made in
20 July of 2015, and then the implementation in November of 2016.

21 Q. So it shows that kind of path of consideration to action?

22 A. Yes.

23 Q. And now another example would be one of the ones -- one of
24 the topics that's been at the heart of this case, the
25 discussion of active against passive funds back in December of

1 2010. That's in light blue, correct?

2 A. Yes.

3 Q. And then we can see more discussion in 2015 and -- and
4 then adding of Vanguard sleeve in 2016?

5 A. Yes.

6 Q. There's -- there's a topic that's come up of effort to
7 sequence activities and -- of the Committee from time to time.
8 Is that illustrated by this chart, or can you just explain how
9 the Committee has thought about that issue that you need to
10 sequence things sometimes and not rush into them?

11 A. Right. If you -- the -- the conversion of recordkeeper in
12 December 1 of 2013, that was before I joined the Committee,
13 but --

14 Q. That's -- that's above the line?

15 A. That's above the line.

16 Q. It's grayed out in the -- in the background, right?

17 A. Right. And that is -- you know, to me, that's really a
18 marker. A recordkeeping transition is fairly complex.
19 There -- it is disruptive to participants, and having come
20 from the recordkeeping side, there's a lot of opportunity for
21 that to go wrong and for participants to get wrong statements,
22 et cetera. So I think it was absolutely appropriate to kind
23 of hands off related to the conversion to make sure that that
24 went as smoothly as possible.

25 THE COURT: One moment, please. Mr. Falvey, as I

1 look at that, what we're talking about here, that has a grayed
2 out box. What -- what does that box -- that says date of
3 conversion to Schwab -- there's a couple grayed boxes.

4 MR. FALVEY: Yeah. Thanks, Your Honor.

5 THE COURT: What's that mean again?

6 Q. Can you explain that, Ms. Gallagher? It's referencing
7 that -- excuse me, that legend to the right, but what's --
8 what's the point there?

9 A. Right. Those were changes that -- that -- that American
10 Century, that we mandated or decided upon, but those are the
11 effective dates when basically Schwab could do it. So the
12 December 1st, 2013, was the day the system went live at
13 Schwab.

14 THE COURT: And then November 2016, there's another
15 grayed out box.

16 THE WITNESS: Right. And that's the date that --
17 November 2016 is when that automatic escalation was activated
18 at Schwab, although the decision had been made sometime
19 earlier.

20 THE COURT: There's a Schwab component here is what
21 this is?

22 THE WITNESS: Yes. Yes.

23 THE COURT: Okay.

24 THE WITNESS: They've got to update --

25 THE COURT: That's what the grayed out box -- grayed

1 out box represents?

2 MR. FALVEY: Your Honor, or another way to put that
3 is these are in a way items that the Committee can't take
4 credit for directly, right? They happened external to the
5 Committee. Although, for auto-escalation, there's a prior
6 entry above the line because you are the ones who decided to
7 add it.

8 THE WITNESS: Yes.

9 MR. FALVEY: The effectiveness of it was later by
10 company operation.

11 THE COURT: Thank you. That explains it.

12 THE WITNESS: We had to wait until they could do it.

13 MR. FALVEY: Thank you, Your Honor, for pointing
14 that out.

15 Q. So, yeah. But, generally, the idea is to show actions by
16 the Committee?

17 A. So just following that, we really then continued to focus
18 on savings rates, as we just talked about, the discussion
19 around auto-escalation and how to implement that. So starting
20 people at 4 percent, how high we wanted to go, to 15 percent.
21 So the mechanics. So it's making the decision, then the
22 mechanics. And then the dark green which, you know, we've
23 talked to with respect to the re-enrollment is making sure
24 that we had that scatter graph from Schwab, and then we could
25 discuss the little nuances of actually executing it in terms

1 of how long the window was. And the part that's kind of
2 behind all of this is the participant communications that need
3 to be distributed -- developed and distributed.

4 Q. Thank you. You can take that down, Chris.

5 On issues like auto -- on savings increases and --
6 and this automatic re-enrollment is -- is this Retirement
7 Committee a leader or a follower?

8 A. I think we're a leader.

9 Q. And how do you know that from the data?

10 A. Because we're starting, for example, at automatic
11 enrollment, starting higher, starting auto-escalation of folks
12 who had been at 1 or 2 percent, getting them all the way to 4.
13 Keeping that 1 percent increase to 15. I think we -- we're
14 absolutely putting those nudges in place to make sure our
15 folks are -- are doing the best they can and the best we can
16 help them with to -- to save for retirement.

17 Q. And do you believe this Committee has also put the hours
18 and thought and work into the investment side of the equation
19 as well?

20 A. I do.

21 Q. Did you ever take direction from anybody at American
22 Century outside of the Committee in connection with any work
23 that the Committee was doing on behalf of the Plan?

24 A. No.

25 Q. Did the Committee ever do that?

1 A. No.

2 Q. Did the Committee ever take into account in any way
3 financial interests of American Century in making decisions on
4 behalf of the Plan participants?

5 A. No.

6 Q. Have you always kept the participants' interests in front
7 as your sole concern in acting as the Committee?

8 A. Yes.

9 Q. Ms. Gallagher, you've had the opportunity, voluntary or
10 not, to sit here in the courtroom throughout and listen to
11 claims by plaintiffs' experts in particular, and perhaps
12 through some of the questioning of defendants' counsel,
13 suggesting that the Committee that you serve on has acted
14 disloyally to its participants and imprudently. Do you have a
15 response or reaction to that, given your knowledge of this
16 Committee's work and processes?

17 A. I do.

18 Q. And what is it?

19 A. We have been using the term plan participant as jargon.
20 And I have worked with -- on behalf of plan participants my
21 whole career. The participants in this Plan are -- are
22 colleagues. They're our friends. It's unconscionable to me
23 that we wouldn't consider their best interests first.

24 Q. And has that ever happened?

25 A. No.

1 Q. You mentioned your secretary earlier. Was there a time
2 when you sat with a group of admins in your job at American
3 Century? Were you kind of on a -- in an area where you were
4 kind of surrounded by admins?

5 A. Yes.

6 Q. And did you -- did you talk to them a lot about their
7 involvement in the Plan?

8 A. I did. I talked to --

9 Q. Why?

10 A. -- them a lot. I wanted to make sure they were saving.
11 That was my biggest worry. That they weren't looking too --
12 they weren't looking ahead far enough. They were worried
13 about their kids and taking care of what they need to take
14 care of right now. And I just wanted to make sure that they
15 were taking the full advantage of the match, they were saving
16 as much as they could in the Plan. And -- and that's what I
17 would talk with them about.

18 Q. Is that what the Committee has done?

19 A. Yes.

20 MR. FALVEY: That's all I have. Thanks,
21 Ms. Gallagher.

22 THE COURT: All right. Thank you, Mr. Falvey.

23 Mr. Lukas, sir.

24 MR. LUKAS: Thank you, Your Honor.

25 CROSS-EXAMINATION

1 BY MR. LUKAS:

2 Q. Good afternoon, Ms. Gallagher.

3 A. Good afternoon.

4 Q. So I'm going to just sort of start in the order of my
5 notes. So I'm going to kind of track Mr. Falvey's exam, I
6 believe. And I wanted to start with DX 738, which is that
7 material from your San Francisco conference back in 2015.

8 A. Uh-huh. Yes.

9 Q. If you could turn to page -- let's see -- 10. Some of
10 these pages look like they're from a survey. Do you conduct
11 some kind of a survey in order to give this speech?

12 A. Yes.

13 Q. And how do you do that? Like what's the -- what's the
14 population that you survey?

15 A. We work with a -- a research firm in Washington, D.C. to
16 do the field work. And we survey plan participants across the
17 country.

18 THE COURT: Is that Greenwald?

19 THE WITNESS: That's Greenwald & Associates,
20 correct.

21 Q. And on this -- and this particular page is basically
22 showing what little confidence plan participants have in
23 choosing the correct investments for their retirement lineup,
24 right?

25 A. Correct. In the national sample. Correct.

1 Q. And you mentioned the balance between preserving choice
2 but providing the best path. Do you remember that?

3 A. Yes.

4 Q. And providing the best path includes -- actually, both
5 include the lineup that the Committee chooses for the core
6 lineup for the Plan, correct?

7 A. Yes. The -- the survey -- the first element, I think the
8 page that's before this -- what we heard from plan
9 participants in our study, their number one regret they have
10 is not saving enough. So they say, I didn't save enough. I
11 don't really know how I invested, but their first element was
12 how important it was to save.

13 Q. And the other page that I wanted to bring your attention
14 to was page 25. And this one's talking about the importance
15 of a -- the existence of a retirement plan to employees or
16 even potential employees, correct?

17 A. Yes.

18 Q. This slide is geared a little more toward the employers in
19 the audience, obviously, trying to highlight the importance of
20 a 401(k) plan from a attractive -- attracting employees and
21 retaining them, correct?

22 A. Yes.

23 Q. You said best in class is best in last. What's -- so your
24 definition of best in class means performance chasing?

25 A. In that instance, yes.

1 Q. Okay. Have you heard the phrase best in class means
2 something different than performance chasing?

3 A. Yes.

4 Q. And what -- how would you -- how -- what's the definition
5 of how you've heard it, the different definition of it?

6 A. An additional dimension would be not just performance, but
7 looking at style drift, et cetera. But when it is most --
8 most often used, it's referring to what's number one right
9 now.

10 Q. But you have heard it used differently from investment
11 professionals when they're talking about best in class?

12 They're not talking about just investing in what was the best
13 thing last year, right?

14 A. I don't know that I've heard it in that context.

15 Q. Okay. Does the performance of a fund matter?

16 A. It is one of the factors, yes.

17 Q. Why does the Committee bother to monitor the funds?

18 A. To make sure that what we're putting forward is -- is an
19 appropriate lineup for our participants.

20 Q. And the idea of monitoring is, at some point you would
21 remove a fund if you thought it no longer did that, correct?

22 A. If that were the case.

23 MR. LUKAS: And will you put up that chart? You
24 can't read my mind? Yeah, that one. You normally do.

25 THE COURT: Yeah, when you say put the chart, I

1 wonder how many charts we have here. I'm with Karla on this
2 one.

3 Q. So you talked about if appropriate, you would remove. But
4 as I understand it, looking at this chart, we removed six
5 funds back here, April 6, 2011, and we removed -- or when I
6 say "we," the Retirement Committee removed six in March 23rd,
7 2017, right?

8 A. Yes.

9 Q. And --

10 THE COURT: And for the record, this is DX 862.

11 MR. LUKAS: Thank you, Your Honor.

12 THE COURT: You got it.

13 Q. Yeah. I circled the box, the April 6, 2011, box, remove
14 six funds. And I circled the box March 23, 2017, freeze one
15 fund and remove six. And they're both yellow coded. And I am
16 correct that between those two dates, no funds were removed
17 from the Plan, correct?

18 A. According to this chart. I can't speak to prior to --

19 Q. Okay. We know a Vista fund was closed by American
20 Century, and so that came out of the Plan. But it wasn't
21 removed by the Committee, correct? That was around 2014, I
22 think. Is that about right? Something like that?

23 A. I don't remember the date, but, yeah.

24 Q. And then we had the American Century Equity Index Fund
25 close, and so that came out of the Plan, but that wasn't a

1 removal from the Committee, correct?

2 A. Again, I was not on the Committee at the time. That's
3 what we've heard.

4 Q. Okay. And when we were talking about adding the index
5 funds, one of the things I heard -- you can take that off,
6 Karla. Thanks.

7 One of the things I heard was that with respect to
8 adding index funds over the years, you were more concerned
9 about design and -- or more focused on design and features of
10 the Plan; is that right?

11 A. Yes.

12 Q. And then when the Committee did talk about it on April
13 28th of 2016, they added those index funds two weeks later,
14 right?

15 A. It was -- the vote was shortly thereafter.

16 Q. Right. And you met on it, talked about it on the 28th,
17 and then two weeks later, it was voted on and approved. In
18 fact, you even finalized the vote by email, correct?

19 A. And we did it by email really because of me, because I
20 wasn't in the office.

21 Q. Well, you didn't want to wait until the next meeting. You
22 did it by email so that it was all voted on and done within
23 less than a month from when you met and talked about it,
24 right?

25 A. We didn't need to wait until the next -- we didn't need to

1 wait until the next meeting.

2 Q. I understand you didn't need to wait, but that was the
3 first time that the Committee voted by something on email with
4 respect to adding or subtracting from the Plan, correct?

5 A. In the time that I had been on the Committee, that's
6 correct.

7 Q. Okay. Now, the job of -- of the client portfolio managers
8 that Ms. Morrison supervised -- you were here for her
9 testimony, and we kind of went through that -- that chart.
10 It's their job to talk to other plans and other clients just
11 like they came and spoke to your Committee, correct?

12 A. That's my understanding of their responsibilities, yes.

13 Q. Uh-huh. And it's their job to be able to articulate
14 reasons why a fund may be not performing up to expectations if
15 that's the case, correct?

16 A. That would be one of the things they would cover.

17 Q. And it's their job to give optimistic reasons why a fund,
18 an American Century fund that is not performing up to
19 expectations will improve, correct?

20 MR. FALVEY: Objection.

21 THE COURT: Yeah.

22 MR. FALVEY: Misstates.

23 THE COURT: Well, I think it's a fair question, but
24 I think there's like four questions there that I think could
25 be merged into one maybe.

1 MR. LUKAS: You can ask it.

2 THE COURT: I mean, Ms. Morrison testified that part
3 of -- that they would communicate and explain things in the
4 context that Mr. Lukas has described. True, Mr. Falvey? Do
5 you agree with that?

6 MR. FALVEY: Yes. It's the optimistic piece that I
7 think there's been absolutely no testimony or direct evidence
8 on.

9 THE COURT: Well, I'm suggest -- I believe that I
10 can ask one question for the four that he asked in that they
11 just -- they would answer questions. They would interact and
12 say, hey, what questions do you have about this. Because
13 Ms. Morrison was very capable of answering those questions.
14 And that type of interaction was what you got from
15 Ms. Morrison, true?

16 THE WITNESS: True.

17 THE COURT: That's what I got from Ms. Morrison. I
18 assume that's what you got from Ms. Morrison. Okay. So --

19 Q. Okay. And when the --

20 MR. LUKAS: I'm sorry, Your Honor. Did I cut you
21 off?

22 THE COURT: That's just -- my point is -- I think
23 your question's a fair question, but --

24 MR. LUKAS: But yours was better?

25 THE COURT: Well, mine -- mine's --

1 MR. FALVEY: Judge's are always better.

2 THE COURT: Yeah. Thank you, Mr. Falvey. Please
3 write that down. That's a good point today. But I think we
4 could ask one question to solve this. I'm trying to -- I'm
5 trying to speed things along. I'm sorry. Go ahead.

6 MR. LUKAS: No. That's okay. That's okay, Judge.
7 That's okay, Judge.

8 Q. And so, Ms. Gallagher, when the American Century client
9 portfolio managers or American Century fund managers presented
10 to the Committee, did the Committee ever decide to remove the
11 fund despite what they told them about the fund?

12 A. In the meetings -- in the Committee meetings that I've
13 been in, we have had continued discussion after they're out of
14 the room, after we've had our questions answered, but we've
15 not voted to remove the fund.

16 Q. Okay. And the same is true when you don't have an
17 American Century portfolio manager or a fund manager come in
18 and talk. You don't have those -- those people come in and
19 talk about what's on the Watch List every -- every meeting.
20 It looked like you just -- some meetings you'd just talk about
21 what was on the Watch List, right?

22 A. It has not been every meeting that we've had a guest
23 speaker.

24 Q. And it seemed to me from reading the minutes when those --
25 those occasions, it was usually Ms. Morrison that would lead

1 the discussion about why or the perceived reasons why it was
2 doing poorly and what the future appears to hold for that
3 fund. Is that a fair statement?

4 A. She would facilitate those conversations because that is
5 her area of expertise.

6 Q. Right. And do you recall Ms. Morrison during those
7 times -- we looked at the minutes, but I'm wondering if you
8 recall her ever suggesting that, you know, we should really
9 get out of this fund?

10 A. I don't recall a conversation like that.

11 Q. Nothing like, you know, this is our weakest team, they've
12 been underperforming for a long time, we should really get rid
13 of this fund? Nothing like that that you can recall?

14 A. I don't -- I don't recall a conversation like that.

15 MR. LUKAS: Okay. I have no further questions, Your
16 Honor.

17 THE COURT: All right. Thank you. Any redirect?

18 MR. FALVEY: None, Your Honor. Thank you.

19 THE COURT: Ms. Gallagher, please take your seat,
20 right?

21 THE WITNESS: Thank you.

22 THE COURT: Thank you.

23 MR. FALVEY: Not allowed to leave the table here,
24 though.

25 THE COURT: We've got to get -- yeah, we got to get

1 Mr. Fleckner out of the way there. Okay. Let's call our next
2 witness.

3 MR. FLECKNER: Okay. Defendants next call Kathleen
4 Mann.

5 THE COURT: Please come forward. And I note there's
6 15 minutes left. So we'll start --

7 MR. FLECKNER: Do you want to break first or --

8 THE COURT: No. I'd rather start and get 15 minutes
9 in.

10 MR. FLECKNER: Sure thing.

11 THE COURT: Ma'am, would you please face our clerk,
12 raise your right hand and be sworn?

13 KATHLEEN MARY MANN, DEFENDANTS' WITNESS, SWORN

14 THE COURT: Please have a seat. Welcome. And would
15 you like some water?

16 THE WITNESS: Yeah. Thank you.

17 THE COURT: Okay. Take -- here. I got it. It's a
18 little bit hard to reach there.

19 THE WITNESS: Thank you very much.

20 THE COURT: It should be a little bit almost cold I
21 think.

22 And Ms. Mann, if you would grab that microphone and
23 pull it close to you and try to speak in it, that will help
24 us. And begin, if you would, by speaking your full name and
25 spelling your last name.

1 THE WITNESS: Kathleen Mary Mann, M-A-N-N.

2 THE COURT: Thank you.

3 Mr. Fleckner, sir.

4 MR. FLECKNER: Thank you, Your Honor.

5 DIRECT EXAMINATION

6 BY MR. FLECKNER:

7 Q. Good afternoon, Ms. Mann.

8 A. Hello.

9 Q. I want to start by asking, have you been retained as an
10 expert in this case?

11 A. Yes.

12 Q. Okay. And for what purposes have you been retained?

13 A. I've been asked to opine on American Century Retirement
14 Committee's practices in overseeing and managing their 401(k)
15 plan, as well as answering questions with respect to the
16 expert reports of some -- two of their experts.

17 Q. Okay. Have you ever been an expert before?

18 A. No, I have not.

19 Q. Okay. So this is your first time testifying in this
20 capacity, correct?

21 A. Yes, it is.

22 Q. Okay. And are you being compensated for your expert work
23 in this case?

24 A. Yes, I am.

25 Q. Okay. And at what rate?

1 A. \$775 per hour.

2 Q. Okay. And, Chris, if you can pull up the first Mann
3 demonstrative, DX 863. Maybe just to expedite the background
4 section, we've put together a slide here of your experience.
5 Is this an accurate representation of highlights from your CV?

6 A. Yes.

7 MR. FLECKNER: Okay. We move the admission of
8 demonstrative DX 863, Your Honor.

9 THE COURT: Any objection?

10 MR. SPECHT: None for demonstrative purposes, Your
11 Honor.

12 THE COURT: All right. Thank you, Mr. Specht.

13 (Defendants' Exhibit 863 admitted in evidence.)

14 Q. Okay. And maybe you can just walk the Court through your
15 background, starting with your educational background at the
16 bottom.

17 A. Sure. I have a BA in economics from Boston College and
18 earned an MBA in finance from Babson College, also located in
19 Massachusetts.

20 Q. Okay. And was there a particular concentration in your
21 MBA course?

22 A. Yes, finance.

23 Q. Okay. And why don't you tell us about -- I'd like to go
24 now through your employment history after college, so maybe
25 reverse chronological order from the bottom up. Can you tell

1 us -- let's start following graduation from business school.

2 A. Sure. Following graduation from undergrad, I started work
3 at Fidelity Investments and was trained as a registered
4 representative, earning the FINRA certification 6 and 63.
5 Those are the certifications necessary to speak to investors
6 and prospects. I --

7 Q. Okay. And let me just pause there for a moment. I think
8 we heard some discussion earlier today about Fidelity. That's
9 a large asset manager, correct?

10 A. Yes, it is. One of the largest asset managers in the
11 world.

12 Q. Okay. So -- I'm sorry. I interrupted you about your
13 qualifications. You said that you were licensed when you were
14 at Fidelity; is that correct?

15 A. Yes.

16 Q. Okay. And which licenses again?

17 A. Series 6 and 63.

18 Q. Okay. And I think we've heard testimony about those FINRA
19 licenses. And can you just tell us generally the jobs that
20 you performed while you were at Fidelity?

21 A. Yes. So the first job was as a registered representative,
22 talking to clients and prospects. And soon after, I was asked
23 to join the global bond trading -- or the bond trading desk,
24 where I was trading U.S. government and corporate bonds and
25 eventually joined a team starting a global bond fund where I

1 began transacting sovereign bonds, currencies and derivatives.

2 THE COURT: This is my signal for slow it down --

3 THE WITNESS: Slow it down.

4 THE COURT: -- just a little bit, please.

5 THE WITNESS: Thank you.

6 THE COURT: Thank you.

7 THE WITNESS: Thank you.

8 Q. Okay. And when you say sovereign bonds, what do you mean
9 by that?

10 A. International government bonds.

11 Q. Okay. And you were there, according to the CV, until
12 1992; is that accurate?

13 A. Yes.

14 Q. Okay. And what did you do after that?

15 A. Soon after that, I actually had a small consulting whirl
16 in between here working for Massachusetts Financial Services,
17 MFS. I did a consulting job for the head of risk management.
18 And the work that I performed there was helping to enhance the
19 risk reporting of the portfolio reports for both internal
20 portfolio managers and management.

21 Q. Okay. So you analyzed risk in portfolios, correct?

22 A. Yes.

23 Q. And then what did you do after that?

24 A. So I began -- I was recruited to Putnam Investments.

25 Putnam had amassed about \$4 billion in global fixed income

1 assets and was in search of a new trader to trade their
2 hundreds -- their multibillion dollars.

3 Q. Okay. And again, you were trading bonds and sovereign
4 debt instruments; is that accurate?

5 A. Global bonds, currency forwards, and other derivatives,
6 yes.

7 Q. Okay. And I think you said billions in assets while you
8 were at Putnam; is that fair?

9 A. Approximately 4 billion, yes.

10 Q. Okay. And then following Putnam, what did you do?

11 A. I -- later in 1998, I joined State Street Global Advisors,
12 SSGA for short. SSGA is the investment arm of State Street
13 Bank where SSGA manages about 2.7 trillion dollars in assets.
14 My job was as a product engineer, which is also at State
15 Street a portfolio management role that reported up to the --
16 to the chief investment officer. I was hired to do that work
17 in the area of global asset allocation. And it was my
18 fundamental macroeconomic background from Putnam Investments
19 that was needed and a complement to a more quantitative
20 organization.

21 Q. And maybe just for the Court, what do you mean by
22 fundamental macroeconomic background?

23 A. So the work I did at Putnam was in doing economic research
24 on the country's politics within them, their bond markets,
25 interest rates, and currency expectations at -- in global

1 bonds. And it was that fundamental work that was helpful at
2 State Street Global Advisors.

3 Q. Okay. And so your first role at State Street Global
4 Advisors was as this product engineer that you've just
5 described, correct?

6 A. Yes.

7 Q. And roughly how much in assets did that team manage while
8 you were there?

9 A. Between 20 and 50 billion dollars.

10 Q. Okay. And that's over a period of time. Did you then
11 progress to a different role within State -- the State Street
12 organization?

13 A. Yes. So at first, my boss asked if I would take on a role
14 to include currency strategies in my portfolio management
15 work. But about five years after I was at State Street Global
16 Advisors and had been working with large institutional clients
17 as well as speaking to prospects of global clients around the
18 world, including central banks and other very large
19 institutions, by virtue of having spent a lot of time on
20 really every asset class, multiple asset classes, including
21 U.S. and international Equities, small, mid and large cap
22 stocks, bonds, international bonds, and money market funds, I
23 was asked to head up the Office of the Fiduciary Advisor.

24 Q. Okay. According to our exhibit, DX 863, that was in
25 approximately 2003, correct?

1 A. Yes.

2 Q. Okay. And tell us what the Office of Fiduciary Advisor at
3 State Street Global Advisors does?

4 A. So the Office of the Fiduciary Advisor is a -- a broad
5 advisory work group advising plans holistically. So where
6 most of the other work at SSGA is done as individual
7 investment management, this was advice, planning, work on
8 asset allocation, plan lineup, mutual funds selection and
9 oversight, or investment strategy, selection and oversight,
10 helping investment committees of retirement plans and
11 endowments do their work as fiduciaries, including things like
12 helping them set agendas and helping deliver on the research
13 that was needed to help support their work as fiduciaries.

14 Q. Okay. And were those retirement plan committees both
15 defined contribution or 401(k) type committees and committees
16 with responsibility for pension or DB, defined benefit assets?

17 A. So many of those plans were retirement committees that
18 were both committees for DB and DC plans.

19 Q. Okay. And so some were specifically DC as well, correct?

20 A. Correct. Yes.

21 Q. Okay. And for those plans, either type of plans, the DC
22 plans or the DB plans, was the role at the Office of the
23 Fiduciary Advisor to be actually a fiduciary or a co-fiduciary
24 for those plans?

25 A. Yes. We typically contracted as a co-fiduciary for that

1 work and in some cases actually were the fiduciary for one of
2 the largest DC plans.

3 Q. And can you tell us, how large were the DC plans that you
4 had any involvement with, either as a co-fiduciary or
5 otherwise working with?

6 A. Yes.

7 Q. How large were those?

8 A. Between about 25 million dollars and several billion
9 dollars.

10 Q. Okay.

11 THE COURT: So as he's doing that, as a -- someone
12 who studies macroeconomics, are you concerned about how much
13 commercial debt is out here in the -- in our locally -- in our
14 economy here in the United States?

15 THE WITNESS: Yes. In some parts, yes, to -- to
16 much degree. And then we have a really nice growth trajectory
17 right now happening. GDP growth is quite strong. So
18 eventually, that will catch up with us.

19 THE COURT: Okay. Thank you. I -- I thought I'd
20 take a little bit for me here --

21 MR. FLECKNER: They're insights.

22 THE COURT: -- while you all are fighting this out.

23 MR. FLECKNER: It's your stage, so whatever --
24 whatever questions you have, certainly.

25 Q. I just wanted to amplify one point. You said that

1 sometimes you might help these committees with their agendas.
2 Were there other aspects of their fiduciary process that you
3 would work with them on?

4 A. Yes. To a certain extent, listening to Ms. VanWagoner
5 earlier, some of the work that the Office of the Fiduciary
6 Advisor did was similar to work as a consultant, like
7 DeMarche. As a co-fiduciary, and in the cases as a fiduciary,
8 the work that we did was really help enhance the processes of
9 the investment committees with whom we worked.

10 In some cases, it was providing an educational
11 topic. In some cases, it was helping them to evaluate and
12 enhance the asset allocation lineup of their plan, et cetera.
13 But with respect directly to your question about agendas,
14 sometimes we were helping to set or enhance the agendas and
15 then helping the committees follow through with them.

16 Q. And did you ever have occasion to help committees with
17 their Investment Policy Statements?

18 A. Yes.

19 Q. Okay. Maybe elaborate just a little bit on that.

20 A. Sure. Probably looked at a large number of Investment
21 Policy Statements. For the Office of the Fiduciary Advisor,
22 working with our legal team, we drafted one sort of template
23 Investment Policy Statement that several clients might have
24 used if they didn't have one of their own, but really did a
25 lot of reviewing of Investment Policy Statements, about 25 of

1 them.

2 Q. Okay. And roughly how many fiduciary committees did you
3 work with during your ten years at the Office of Fiduciary
4 Advisor?

5 A. Between 30 and 50, of which 30 were more ongoing clients.
6 And of those, about five were ongoing DC clients. Of the
7 other plans, of the DB plans, maybe about 15 of those would
8 also ask us to do periodic discrete work on their DC plans.

9 Q. Okay. And did you observe that all the fiduciary
10 committees they worked with operated exactly the same way and
11 had exactly the same processes?

12 A. Absolutely not.

13 Q. Okay. Did you observe a variety of processes in your
14 career?

15 A. Yes.

16 Q. Okay.

17 A. Every single committee that we worked with and every
18 single plan was different from each other.

19 Q. Okay. And maybe just one last question to wrap this up,
20 and then our break. Could you just describe briefly what
21 you've done professionally since 2013.

22 A. Sure. I was the chief investment officer at one of the
23 local law firms in Massachusetts where trust assets can be
24 managed in-house, for about \$2 billion in assets. And then
25 more recently spent time at the Massachusetts Technology

1 Collaborative spending my time learning financial technology
2 and FinTech.

3 MR. FLECKNER: Okay. I was about to move to a
4 different topic, but maybe there's a break?

5 THE COURT: I think now is a good time for our
6 recess.

7 MR. FLECKNER: Great.

8 THE COURT: We'll take a 20-minute recess, since
9 this is the afternoon recess. And thank you. We'll be in
10 recess.

11 THE WITNESS: Thank you.

12 (Recess at 2:59 until 3:21 p.m.)

13 THE COURT: I'd like to start by announcing, we
14 usually go until five o'clock. If I can just stop at 4:45
15 sharply --

16 MR. FLECKNER: Okay.

17 THE COURT: -- today because of something I need to
18 attend to. Okay. Sorry about that. But we will make it up
19 to you somehow.

20 MR. FLECKNER: No problem. We cut a witness today.

21 THE COURT: We'll cut off some direct and some
22 cross, how about that?

23 MR. FLECKNER: We cut a whole witness. We'll be
24 efficient. We'll be efficient.

25 THE COURT: That would be great. That would be

1 great. Thank you. Please proceed.

2 MR. FLECKNER: Okay. Do you need her name back for
3 the record? I forget.

4 THE COURT: No, not until maybe -- after evening
5 break we do that generally. Thank you.

6 MR. FLECKNER: Okay. Very good.

7 Q. Okay. So, Ms. Mann, welcome back.

8 A. Thank you.

9 Q. Now I want to turn to the opinions that you rendered in
10 this case. And, first, can I just ask, what did you do to
11 render the opinions in this case?

12 A. I reviewed the Plan documents, the meeting materials,
13 the -- a number of different publicly available research data
14 like Deloitte studies, et cetera.

15 THE REPORTER: I'm sorry?

16 THE WITNESS: I'm sorry. Deloitte studies.

17 THE COURT: Deloitte.

18 THE WITNESS: Hewitt studies.

19 Q. And did you review any materials looking at the Plan's
20 participation base?

21 A. Absolutely, yes. I -- included in the meeting materials,
22 I looked at the Plan's not only participation rates, the rates
23 at which participants were saving, as well as Plan balances.

24 Q. Okay. And based on the review that you did, did you form
25 any conclusions?

1 A. Yes, I did.

2 Q. Okay. And can you just give a brief overview of your
3 conclusions, and we'll go through them in more detail?

4 A. Sure. I thought that the work of American Century
5 Retirement Committee was very solidly performed. I felt that
6 they executed their fiduciary duties in some areas in a very
7 exemplary matter, in some areas consistent with trends,
8 with -- with industry standards and practices that I have seen
9 in the large number of plans that I have worked with over my
10 career.

11 Q. Okay. Well, let's -- let's start walking through some of
12 those opinions. If you could bring up the second
13 demonstrative, Chris. And I want to start with the
14 composition of the Committee.

15 What did you observe about the members of the
16 Retirement Committee during the class period, which is June
17 2010 to the present?

18 A. So I thought it was terrific that the Committee included
19 one or two CFAAs for all of its time periods, senior executives
20 that -- that -- based on the -- my reading of the record were
21 empowered to make decisions and render opinions on important
22 matters.

23 Q. Okay. And did you -- when you say that they were senior
24 employees, did you see whether or not they were operating free
25 of management influence?

1 A. Yes. It was -- it's my opinion that the Committee was,
2 while appointed by the Management Committee, operated without
3 any undue influence by management of the organization.

4 Q. Okay. And we heard earlier today reference to C-Suite.
5 Did you see the existence -- except for Ms. Neumann, who's a
6 technology officer, did you see any representation of C-Suite
7 executives?

8 A. No, I did not. And that's not typical. Some of the
9 committees that I have seen and worked with have CFOs, have
10 general counsels, but some C-Suite members on their
11 committees. And I thought this was a very effective rendering
12 of a Retirement Committee.

13 Q. Okay. And Demonstrative 3, Chris. I think you mentioned
14 that you didn't observe any senior executives or management
15 influencing on the Committee. Did you see management of
16 American Century have any role with respect to the Plan?

17 A. Yes.

18 Q. And what was that?

19 A. Management Committee was responsible for appointing the
20 Retirement Committee members. And I saw in the record
21 periodic keeping the Management Committee members abreast of
22 important matters.

23 Q. Okay. And based on your experience, was the Management
24 Committee's level of involvement consistent with what you see
25 in the industry?

1 A. Yes. Not hovering, not hovering over and making decisions
2 for the Committee. Really empowering the Retirement Committee
3 to discharge its duties.

4 Q. Okay. Did you see any red flags or other warning signals
5 from the Committee or the operation of the Plan that might
6 counsel that the Management Committee take a more active role?

7 A. No.

8 Q. And, third, I want to talk -- Chris, Demonstrative 4. I
9 want to talk about how Committee members joined the Committee.
10 Did you review information in the record about how Committee
11 members joined the Committee, the onboarding of Committee
12 members?

13 A. Yes.

14 Q. Okay. And did you make any observations with respect to
15 that onboarding process?

16 A. Yes.

17 Q. And what was that?

18 A. The fiduciary onboarding practice of this Committee is one
19 of the very exemplary things, practices that I have seen among
20 many of the committees that I have worked with. The fiduciary
21 toolkit with which they were presented was solid. The
22 material and the seriousness with which the organization took
23 and explained to new Committee members was their
24 responsibility. And doing an in-person meeting as well to
25 walk through both the materials and the responsibilities was

1 really outstanding.

2 Q. Do you typically see those kinds of in-person meetings
3 with other committees that you've worked with over the years?

4 A. Some in-person meetings, but the combination of the
5 toolkit and the meetings and the materials shared was, I
6 thought, really outstanding.

7 Q. Okay. Based on your review of the material and some of
8 the testimony that you've seen -- and I know you've been in
9 the courtroom for some of the testimony, do you believe that
10 the Committee members understood that they were fiduciaries?

11 A. Yes. I strongly felt that way based on my reading of the
12 record, but I felt -- I feel even more strongly that way after
13 hearing some of the testimony.

14 Q. Okay. And -- and have you seen any indications in the
15 record that you reviewed that any of the fiduciaries acted
16 contrary to their obligations?

17 A. No, I did not.

18 Q. Okay. I now want to move to the process that the
19 Committee utilized that you observed. So let's start with
20 Demonstrative 5, Chris.

21 I'd like to start with the Investment Policy
22 Statement. You've had an opportunity to review the Investment
23 Policy Statements that were applicable during this time
24 period?

25 A. Yes.

1 MR. SPECHT: Your Honor, I have an objection to the
2 way that this examination is proceeding. It seems like
3 Mr. Fleckner is just sort of giving her a demonstrative that
4 summarizes her report, and he's asking if she agrees with it.
5 And I don't want to slow things down, but at the same time, I
6 don't think it's fair to just lead the witness this way.

7 MR. FLECKNER: These are just, you know, point
8 slides as a guidepost to try and move this along.

9 THE COURT: Yeah. Listen, you're going to have a
10 chance to cross-examine. I -- I want him to really do it the
11 way he's doing it to kind of make things move along here.
12 This witness wrote an expert report. And these seem to be
13 consistent with that expert report. And I'm -- I'm going to
14 overrule your objection at this time.

15 Please continue doing the same thing you're doing,
16 Mr. Fleckner.

17 MR. FLECKNER: Thank you, Your Honor. I will.

18 Q. Why did you start with the Investment Policy Statement?

19 A. I always start with the documents. I think that that's
20 the first place to go. It is the guidepost, and it's a set of
21 guidelines that every committee has to work with. And I
22 really wanted to see in their words what their
23 responsibilities entailed and how they articulated their
24 responsibilities.

25 Q. Okay. And, again, we've heard quite a bit about the

1 Investment Policy Statements, so I won't go through all of the
2 specifics, but let me ask at a higher level. Do all
3 retirement plan committees that you've worked with or observed
4 utilize an Investment Policy Statement?

5 A. I would say they didn't all utilize Investment Policy
6 Statements earlier on, maybe in the '06s, before the PPA. And
7 I would say since the Pension Protection Act, more committees
8 use an Investment Policy Statement.

9 Q. Okay. Would you consider this to be best practice?

10 A. Yes.

11 Q. Did you observe any indication in the record as to whether
12 the Retirement Committee adhered to the Investment Policy
13 Statements?

14 A. Yes. Everything that I read in the record indicated that
15 the Investment -- the Retirement Committee operated according
16 to its Investment Policy Statement.

17 Q. And how would you compare the Committee's utilization of
18 the Investment Policy Statement to that of other committees
19 that you've observed in your career?

20 A. Well, not every committee uses their IPS, if I can call it
21 that, and keeps it at every meeting as a reference tool. I
22 thought that was a very -- a very solid practice. This
23 committee also updated its Investment Policy Statement that I
24 saw five times, I believe, over the course of the -- of the
25 period. And so it was a living, breathing document.

1 Q. Okay. And again, how does that compare to other
2 committees that you've observed in your career?

3 A. Very strong practice.

4 Q. Okay. And I'd like to talk about some of the specifics,
5 more generally.

6 Let's wait one second, Chris.

7 More generally, how would you compare the substance
8 of the Plan's IPS or Investment Policy Statement with those
9 that you've reviewed or -- I think you talked about actually
10 offering drafts to other committees? How does this IPS
11 compare?

12 A. So this IPS is consistent with industry standards and
13 practices that I've seen. And I like especially some
14 particular areas, one especially about the philosophy.

15 Q. Okay. And let's take a look at that, if we could, Chris.
16 The call out on JX 54.06. And I'll just represent, this is
17 page 6 of the IPS. We can look at the cover page. Actually,
18 let's just look at the cover page briefly, Chris, so we can
19 orient the year of this. So this is -- 54, Chris.

20 So this is the Investment Policy Statement as of
21 August 1st, 2010. And now, Chris, if we can go to the callout
22 on page 6.

23 And is this the philosophy that you were referring
24 to?

25 A. Yes.

1 Q. Okay. And what did you observe, and what did you like
2 about it?

3 A. So I, as an investment person whose roots are in asset
4 management, I strongly agree with the long-term investment
5 performance being a function of asset class and
6 diversification. And I also appreciated seeing the Retirement
7 Committee lay out the asset classes that they chose to
8 incorporate into the Plan, a very diversified set of solid
9 asset classes --

10 Q. Okay.

11 A. -- that would allow -- I'm sorry, Jamie --

12 Q. Yeah.

13 A. Excuse me. To make diversified investments for their Plan
14 and for their retirement savings.

15 Q. Okay. There's been some discussion in the case about one
16 of the asset classes identified here, sector funds. Do you
17 have any concerns with the listing of sector funds in the
18 Investment Policy Statement?

19 A. I do not.

20 Q. And why not?

21 A. Well, when you think about the risk and return of certain
22 asset classes, to you, Your Honor, if money market funds are
23 here, sort of lower risk, and as you go up the spectrum,
24 bonds, U.S. equities, international equities, sector funds
25 would be here, and then individual securities, like company

1 stock, would be there. So there's a really lovely and diverse
2 spectrum of asset classes across there. And for a
3 sophisticated investor base like American Century's, that
4 seemed fine.

5 Q. Okay. And did -- there's also been some discussion about
6 the monitoring procedures that were encompassed in the
7 Investment Policy Statement. Did you have an opportunity to
8 review those procedures?

9 A. Yes.

10 Q. Okay. And do you have any concerns about those
11 procedures?

12 A. No.

13 Q. Okay. Let's do the callout now on Exhibit 56.10. And
14 this is from that same 2010 Investment Policy Statement in JX
15 54. And these are the monitoring procedures that you referred
16 to; is that correct?

17 A. Yes.

18 Q. Okay. And what about that --

19 A. And --

20 Q. Yeah. Go ahead.

21 A. -- if I may?

22 Q. Please.

23 A. Under the performance objectives, this piece here about --
24 ooh -- recognizing that the short-term fluctuations may cause
25 variations, the Retirement Committee intends to evaluate

1 performance over a long-term perspective. And I also think
2 that's a very important component of looking at investment
3 management.

4 THE COURT: Could you slow down?

5 THE WITNESS: Thank you.

6 Q. Okay. Because I know this is your first time testifying
7 as an expert, because we have the court reporter here and
8 we're creating a written record, we just need to accommodate
9 that --

10 A. Thank you.

11 Q. -- as we -- as we go.

12 Why did you believe that this focus on long-term
13 performance or long-term perspective, more accurately, in the
14 IPS was appropriate?

15 A. It -- it is both my observation of investment reality and
16 the practices that I saw many other committees utilize,
17 including committees that I advised, that -- looking at
18 investment managers over a market cycles -- over a market
19 cycle. And full market cycles can last three years, five
20 years. We're in one that's longer than 10 years currently.
21 So over full market cycles is the best way to observe
22 different strategies. In addition, sometimes a -- more of a
23 value based bias strategy or a growth bias strategy might have
24 a market environment in which any strategy like that is not
25 performing well. So to -- to see, to observe this, it's

1 helpful over a full market cycle.

2 Q. Okay. And did you have any views on the second part that
3 we have in the callout about frequent change? Did you form
4 any opinions about that language in the Investment Policy
5 Statement?

6 A. Yes. It --

7 Q. Go ahead.

8 A. It's been my observation that frequent manager turnover is
9 not helpful for plan participants, or, frankly, any plan or
10 fund. Frequent manager turnover can result in locking in
11 losses, attempting to transact in very difficult or illiquid
12 market environments, and can add costs to -- to the underlying
13 assets with -- with too much manager turnover. And also, it's
14 disruptive to Plan participants. But I think the -- the other
15 three pieces are just -- are the most important.

16 Q. Okay. So have you observed committees that have a
17 different philosophy and that do engage in that kind of
18 short-term turnover?

19 A. Yes, I have.

20 Q. And do you believe that that's a best practice in the
21 industry to have that kind of short-term turnover?

22 A. I don't believe that is a good or solid practice. There
23 are some exceptions. And some of those exceptions might be
24 during, say, the period of time where there was market turn --
25 market timing in international equity markets. There -- one

1 of our clients was utilizing a manager who had very strong
2 small cap performance and loved having that fund in their
3 401(k) lineup. However, we advised them, look, the -- the
4 managers and the senior C-Suite executives are actually doing
5 market timing trading in these own funds and taking away from
6 performance. So is this the kind of organization and asset
7 manager you want to do business with. So there may be things
8 that aren't just about performance. It may be about other
9 factors that might cause you to want to make change.

10 Q. And -- and maybe just for the record, can you explain what
11 market timing is in that context that you observed?

12 A. I hope I can do it shortly and slowly. In international
13 equity funds at that time, the NAV, or the net asset value,
14 was set at four o'clock in the afternoon as U.S. mutual funds
15 typically do. However, with international equity funds, the
16 market and benchmark stopped trading at noontime London --
17 noontime east coast and end of day London time so that there
18 was this gap of time where markets moved and people could take
19 advantage of the difference between that move and the end of
20 day price.

21 Q. Okay. So that would be an example where you think a
22 short-term move away from that fund might be sensible, fair?

23 A. Yes.

24 Q. Okay. And there's been some suggestion, I think, in fact,
25 by one of the experts who testified for plaintiffs that

1 perhaps the best approach for a committee to take is to field
2 a team of all stars. I don't know if you were there for that
3 particular testimony?

4 A. I was.

5 Q. Okay. Do you agree with that view?

6 A. I think that would be great if somebody can do that.
7 However, it's -- I've never seen it done. Neither have
8 retirement committees been able to field a team of all stars
9 that are all stars all the time. And it's extremely difficult
10 in advance to select managers who will be all stars because
11 one doesn't know what the markets will -- will do and will
12 allow going forward.

13 Q. So you don't believe that would be a fiduciary best
14 practice; is that fair?

15 A. I don't believe it's possible.

16 Q. Okay. I want to turn now to another aspect of the
17 Investment Policy Statement, maybe Mann Demonstrative 6.
18 We've talked about the philosophy. I want to ask you now more
19 specifically about the monitoring. Did you get a chance to
20 review the Watch List criteria that's been discussed in the
21 case?

22 A. Yes.

23 Q. Okay. And what did you observe with respect to the Watch
24 List?

25 A. I observed several things. The Watch List was actively

1 used. Not always true of every committee. I saw funds -- and
2 I wanted to see this in my review, funds go on the Watch List
3 according to the criteria set out. I wanted to see the
4 process where funds coming off of the Watch List, which I also
5 saw. And I wanted to look at the criteria for putting funds
6 on the Watch List.

7 Q. Okay. So let's start with the criteria. There's been a
8 lot of discussion that for the majority of time period in this
9 class period, the criteria involved something like --
10 something called information ratio. Are you familiar with
11 that concept?

12 A. Yes. Very.

13 Q. Okay. And you reviewed those criteria in the Investment
14 Policy Statement, correct?

15 A. Yes.

16 Q. Okay. And I don't think we need to go over again what the
17 information ratio is unless it would help the Court. I don't
18 think it might.

19 THE COURT: You gave me a great tutorial, you and
20 Mr. -- and the plaintiffs have given me a good tutorial on
21 that too.

22 MR. FLECKNER: Fabulous.

23 Q. So let me just ask you whether you felt it was appropriate
24 for the Committee to use information ratio as a criteria for
25 whether a fund comes on the Watch List?

1 A. Yes. Absolutely.

2 Q. And why do you believe that was an appropriate criteria?

3 A. Information ratio is a great tool for looking at a
4 combination of risk and return. When a Retirement Committee
5 wants to review a manager or managers, it wants to see how
6 effectively managers are using the risk budget that they are
7 allowed to use to deliver returns. And information ratio is a
8 terrific tool to do that. It is also something that I have
9 used and introduced to many of my more sophisticated
10 committees, at least at the beginning of the class period,
11 that wasn't really what -- well, it wasn't always used. It
12 became -- it has become a more useful tool, even if the notion
13 of information ratio has been used for a long time within
14 asset managers.

15 Q. And are you aware that the Retirement Committee in this
16 case utilized an information ratio that looked at gross
17 performance of fees as opposed to net performance of fees?

18 A. Yes, I am.

19 Q. And did you have any concerns with their utilization of
20 gross performance as opposed to net performance for purposes
21 of the information ratio?

22 A. I did not.

23 Q. And why not?

24 A. Two reasons. One, the notion of a Watch List and having
25 information ratio, among many other tools, as a trigger for

1 Watch List really was what then brings attention and
2 additional oversight to -- to that strategy. So as a trigger,
3 I see it's perfectly fine.

4 Second, if you're trying to see how a manager
5 delivers risk adjusted returns, it's also a very effective
6 tool.

7 And I guess there's a third reason. And that is
8 because I saw the Committee looking at fees at the strategy
9 and at the overall plan level in every meeting as well.

10 Q. And maybe, if we could, Chris, DX 843, which we introduced
11 with Mr. Bouffard. The issue that I think the plaintiffs have
12 raised is that one aspect of the denominator -- I'm sorry, the
13 numerator, the funds performance is gross, is the benchmark
14 that it compares itself to as the other aspect in the
15 numerator, also a gross figure?

16 A. So, yes, benchmarks don't have fees taken out of them, so
17 it's a better apples to apples comparison.

18 Q. Okay. You can pull that down, Chris.

19 And I think it was implicit in your testimony, but
20 just to make explicit, has every fiduciary committee that
21 you've worked with over the years used information ratio in
22 monitoring funds?

23 A. No. They have not.

24 Q. Okay. But yet you didn't have concern with its use,
25 correct?

1 A. Excuse me?

2 Q. You didn't have concern with its use here?

3 A. Not at all.

4 Q. Okay. Because the more -- I think you testified, the more
5 sophisticated committees utilize it, correct?

6 A. Yes. I think some committees are still using just risk
7 and looking at return separately. This is a good tool.

8 Q. Okay. And then focusing on the practical application of
9 the Watch List, what was the effect of a fund being on the
10 Watch List for this Plan?

11 A. What I saw in the record is that when a strategy was below
12 zero, negative 0.5 IR, it was added to the Watch List, and the
13 Committee then looked more closely at performance, moved it up
14 the priority list. I liked seeing that the Watch Listed funds
15 were looked at first typically in the -- in the meeting
16 materials. Often, and as needed, the Retirement Committee
17 brought in portfolio managers to do some further
18 investigation, so I thought it was given the gravity and the
19 additional attention that I thought it should be.

20 Q. Okay. Was that consistent with what you observed in
21 better functioning committees?

22 A. Yes.

23 Q. One of the plaintiffs' experts, or maybe both of their
24 experts, have criticized the Investment Policy Statement that
25 was in use at this time for lacking detail, characterizing the

1 criteria as "toothless." Have you heard that criticism in
2 this case?

3 A. I did.

4 Q. And do you share that view?

5 A. I do not.

6 Q. And why not?

7 A. Well, having rigid criteria would force a committee to
8 make decisions such as getting rid of a fund at perhaps the
9 most difficult time, maybe even locking in losses. And that's
10 not the way I observed solid industry practices in my
11 experience. Good industry practices gave retirement
12 committees the flexibility to make decisions the way they saw
13 them in the best interest of plans and participants.

14 And every committee didn't all use the same set of
15 tools or the same set of criteria. But the committees that I
16 have worked with and advised were able to utilize a Watch
17 Listing criteria that some might have called toothless for the
18 same reason but provided the right amount of flexibility for
19 the retirement committee to execute its duties.

20 Q. Okay. And just generally in your field in working with
21 retirement committees, have you observed whether there's
22 differing opinions as to the amount of specificity in the
23 criteria that could be included in an IPS?

24 A. Yes. Sure.

25 Q. Okay. There's a debate --

1 A. Wide range I would say. In the same way that every plan
2 is different in its -- maybe the risk comfort of its
3 retirement committee or the asset classes they're willing or
4 able to utilize. The way they monitor their plans also is
5 unique and doesn't all conform to one rigid manner.

6 Q. Okay. Do you believe that the Investment Policy Statement
7 that we just looked at, effective 2010, is inconsistent with
8 industry standards that you've observed in that it does not
9 include specific criteria to make a sell decision or to remove
10 a fund from the menu?

11 A. No, not based in my experience.

12 Q. Okay. And we also heard testimony from Mr. Levy that in
13 his experience, it would be highly unusual for an investment
14 to remain in a plan's lineup if it spent more than five
15 consecutive quarters on a Watch List. Is that --

16 THE COURT: What's your objection?

17 MR. SPECT: Objection. That mischaracterizes
18 Mr. Levy's testimony.

19 THE COURT: What did Mr. Levy say?

20 MR. SPECHT: He said it would be unusual for it to
21 remain on the Watch List for five consistent quarters without
22 a prudent justification for hanging onto it. So it's not just
23 the five quarters and you're out. It's five quarters and then
24 you have to have a reason to hang onto it.

25 THE COURT: Well, I've got about six notebooks of

1 notes, and I don't have Mr. Levy's notes with me. Maybe --
2 and I -- so I don't recall that nuance, but that's an
3 important nuance. I agree with Mr. Specht.

4 MR. FLECKNER: So we're just looking now at --
5 understanding it's the rough transcript.

6 THE COURT: Well, you've got to be careful on that.

7 MR. FLECKNER: I understand.

8 THE COURT: Why don't you show Mr. Specht that too
9 before you --

10 MR. FLECKNER: Certainly.

11 MR. SPECHT: We can read all that into the record.
12 I'm fine with that.

13 THE COURT: No, you can't, according to the contract
14 you signed with my court reporter so you --

15 MR. FLECKNER: Let me ask you this without regard --

16 THE COURT: And there's -- and there's a reason why
17 we don't let these uncertified transcripts in. But if you two
18 can agree on what it says or what -- if you can agree on what
19 Mr. Levy said, then that's -- that's fine.

20 MR. FLECKNER: Why don't I ask the question without
21 regard to Mr. Levy, and maybe that will work.

22 THE COURT: Okay. Thank you, Mr. Fleckner.

23 MR. FLECKNER: You're welcome, Your Honor.

24 Q. Do you believe that it would be highly unusual for an
25 investment to remain on a Plan's lineup if it spent more than

1 five quarters on a Watch List?

2 A. Jamie, would you say that one more time?

3 Q. Sure. Do you believe it would be highly unusual for an
4 investment to remain on a plan's lineup if it spent more than
5 five consecutive quarters on a Watch List?

6 A. No.

7 Q. Okay. Why not?

8 A. Well, investment strategies can remain on Watch Lists for
9 several years at times. Again, depends on the market cycle,
10 the range of underperformance and the reasons for that. So
11 mostly depends upon what is the practice and what is the
12 review process that the Committee goes through to understand
13 why a strategy is on -- is -- is performing the way it's
14 performing. And so no --

15 Q. Okay. Have you observed in your career committees that
16 you believe are functioning appropriately that nonetheless
17 have investments on their plan's lineup that have remained on
18 their Watch List for more than five quarters?

19 A. Yes.

20 Q. Okay. So did you see anything out of step with -- with
21 fiduciary practices that you've observed to the extent there
22 have been funds on this Plan for American Century that have
23 remained on a Watch List for more than five quarters?

24 A. No.

25 Q. Let's turn back to Mann 6 just for a moment. One last

1 item of the Investment Policy Statement I wanted to ask you
2 about. Did you observe that the Investment Policy Statement
3 as of 2010 stated an intent to offer American Century funds?

4 A. Yes, I did.

5 Q. Okay. And did you have any concerns with that stated
6 aspect of the Investment Policy Statement?

7 A. I did not.

8 Q. Okay. We can pull that down, Chris.

9 In your experience, was the American Century Plan
10 unusual in including affiliated funds, even up until 2016,
11 exclusively affiliated funds on the core lineup with a
12 brokerage account?

13 A. No. That was not unusual among financial services firms'
14 asset managers that I've experienced.

15 Q. Okay. So you have personal experience with how asset
16 managers utilize their own products for their own employees'
17 401(k) plans?

18 A. Yes.

19 Q. Okay. And just describe that experience, please.

20 A. So one of the clients that I worked with closely was an
21 asset manager and used all but one strategy in their lineup of
22 affiliated funds. And my experience working at Fidelity
23 Investments for seven years and Putnam Investments for five
24 and a half years also showed their 401(k) plans that used all
25 in-house lineups.

1 Q. And in addition to your personal experience, did you
2 observe any indication in this particular record that
3 corroborated your experience about the utilization of -- we'll
4 call it proprietary funds for a 401(k) lineup?

5 A. Yes. I actually wanted to see and compare and take a look
6 at how asset managers did this or update it.

7 Q. Okay. And let's take a look -- I think it's DX 769,
8 Chris.

9 And I'm showing you now DX 769. Are you familiar
10 with this document?

11 A. Yes.

12 Q. Is this the look that you -- or form that you just
13 mentioned?

14 A. Yes.

15 Q. Okay. Can you explain to -- it says Exhibit 15 on the
16 top. That's Exhibit 15 of your report, correct?

17 A. Yes, it is.

18 Q. Okay. And can you explain what you did here in Exhibit 15
19 of your report?

20 A. Yes. So I gathered the asset managers by retirement plan
21 usage by plan. And the top 15 managers are listed here. And
22 then the name of their 401(k) plan is next and -- as well as
23 the number of options. But the column that we're looking at
24 here is did they use affiliated investments in their 401(k)
25 plan. And all of the top 15 managers do use affiliated

1 investments in their funds.

2 Q. All right. And the data source that you utilized is what?

3 A. This is the BrightScope -- BrightScope Beacon data.

4 Q. And, generally, what are those data?

5 A. BrightScope gathers data from the 5500 filings on the
6 number of managers they use in their plan lineup assets, other
7 information about their plan. The number of participants
8 would be included, as well, for example.

9 Q. Okay. And, Chris, if we can highlight row 13.

10 And we see this is the row for American Century
11 Investments, correct?

12 A. That's correct.

13 Q. And what does the value 13,632 in the third column
14 signify?

15 A. So this column is the number of retirement plans that
16 utilize at least one strategy at each of these asset manager
17 firms.

18 Q. Okay. So --

19 A. 13,362 -- 632, excuse me, plans used an American Century
20 fund.

21 Q. And that's as of December 2015, correct?

22 A. That's correct.

23 Q. Okay. And just so we don't have to bring this slide up a
24 second time, you had also mentioned firms like Fidelity that I
25 think we've heard quite a bit about. And this indicates that

1 they utilized their own funds for their own plan. And we've
2 heard a little bit about T. Rowe Price. And this indicates
3 that they use their own funds for their own plan.

4 A. Yes.

5 Q. Is that correct?

6 A. Yes, it is.

7 Q. Okay. And the other thing that I'd like to ask you about
8 that's come up is the number of investment options that were
9 offered in the core lineup of this plan. Did you learn
10 anything when you did this exercise about whether the Plan
11 Lineup in this case was inconsistent with other financial
12 services companies?

13 A. I concluded from this that -- and among other things as
14 well that the Plan lineup at American Century wasn't overly
15 large.

16 Q. Okay. What other things -- and -- and let me just pause.
17 When you say "this," are you referring to the second to last
18 column of data here that identified a number of core
19 investment options utilized as of December 2015 by these other
20 asset management firms?

21 A. Yes, I am. And American Century sort of falls close to
22 the middle of this range.

23 Q. Okay. And what other experiences were you referencing a
24 moment ago?

25 A. I guess I was also thinking about the -- one of the firms

1 that I also worked for, State Street, who also used a
2 predominantly in-house lineup.

3 Q. Okay. And also offered a range of options consistent with
4 what's identified here for the American Century Plan?

5 A. Yes.

6 Q. Okay. You can take that down, Chris. And I know no one
7 in this courtroom wants to see JX 10 again, which is the
8 Hewitt report. But did you see any indication in the Hewitt
9 report of 2010 about use of proprietary funds for these
10 financial services companies?

11 A. Yes, I did.

12 Q. And what did you observe?

13 A. I observed in the Hewitt report Hewitt noting that
14 American Century utilized affiliated funds and that of the
15 plans that they looked at, about 82 percent utilized some
16 affiliated funds of the -- of the financial services firms
17 they reviewed, and 41 percent used all affiliated funds in
18 their lineup.

19 Q. Okay. And that was consistent with your personal
20 experience, the independent invest- -- and the independent
21 investigation that you performed in this case; is that
22 correct?

23 A. Yes.

24 Q. Okay. And did you believe that the Committee, the
25 Retirement Committee here, was under any obligation to

1 consider nonaffiliated investment options?

2 A. No.

3 Q. And why not?

4 A. Because the lineup of funds that they had was -- was
5 prudently and diligently reviewed, overseen and put into the
6 Plan. The lineup was a solid lineup of strategies,
7 diversified across the asset classes, that would allow
8 participants to -- to create and invest in diverse funds for
9 their retirement savings. So, no, I didn't see any reason
10 that they needed to.

11 Q. Okay.

12 A. And I have the -- excuse me. They also had the PCRA as
13 well for those who wanted to go outside.

14 Q. Okay. So you considered the PCRA as part of your
15 thinking, correct?

16 A. Yes.

17 Q. Chris, if we can pull up Demonstrative 8. Turning to
18 another aspect of the Committee's process, did you form any
19 opinions about the regularity with which the Committee met?

20 A. So I recognize that this -- yes, I did.

21 Q. Okay. And what did you observe?

22 A. I was going to say I recognize that this may not be the
23 sexy part of -- of retirement overviews and diligence,
24 however, this Committee --

25 THE COURT: There is a sexy part?

1 THE WITNESS: Some people would not say that. I
2 know. I know. So --

3 THE COURT: We're getting close to the end now, and
4 I haven't seen -- but go ahead.

5 MR. FLECKNER: My wife precludes me from talking
6 about ERISA at cocktail parties.

7 THE COURT: So does mine, by the way.

8 MR. FLECKNER: But this is what I do, sadly.
9 Anyway.

10 THE WITNESS: As have I. Investments are also not
11 the sexy part. The equity part is, right?

12 So -- so what I very much appreciated seeing was the
13 meeting of the Committee, meeting three or four times a year,
14 adding special meetings as they saw necessary, delivering
15 meeting minutes a week or so in advance. Not every committee
16 does this. This Committee did it incredibly well. Expecting
17 that Committee members would come prepared with reasonable
18 questions. And in the record and in the minutes, I observed
19 that the dialogue and the questions were very helpful, really
20 showed an engaged set of Committee members.

21 And one of the other things that I don't think folks
22 think about, but I have observed with looking at committees
23 where there's maybe a very dictatorial chair or one strong
24 member, I appreciated seeing that commentary came from a
25 variety of the Committee members, not always one single

1 member. And, to me, that's one of the many signs of a very
2 strongly working committee and a committee able to work and
3 function together.

4 Q. Okay. So is it -- how would you compare this to other
5 committees that you've worked with?

6 A. I would say exemplary. Very, very, very strong.

7 Q. Okay. And let me pull up DX 857, the ninth demonstrative,
8 Chris.

9 And does this summarize what you observed as to
10 attendance at the committees?

11 A. Yes. I -- I actually wanted to see who was showing up.
12 Was it just people showing up in name or in -- did people
13 really attend these meetings. I was -- I was very pleased to
14 see very consistent attendance at -- at all of them, including
15 the special meetings as well.

16 Q. Okay. And so maybe you can just walk us through. You
17 mentioned special meetings. Is that the blue/purple star on
18 the left-hand side?

19 A. Yes. So down the left side are the dates of each of the
20 meetings with a green rectangle and the purply blue star were
21 the special meetings that were put in place to do things like
22 review the Hewitt report in November of 2010 and then
23 follow-up with that in December of 2010, for example.

24 Q. Okay. And we're familiar, I think, with the names on the
25 top row. What did the green -- as members of the Committee,

1 including those who have the CFA designation that you
2 identified, what do the green dots tell us?

3 A. That the green dots are the Retirement Committee's
4 attendance at the meetings.

5 MR. FLECKNER: Okay. And, actually, can we move to
6 admit DX 857 at this point?

7 THE COURT: Any objection to 857?

8 MR. SPECHT: One very minor thing, Your Honor. This
9 exhibit indicates that Ms. VanWagoner is a CFA charter holder.
10 I don't believe that's accurate. And so that would be the
11 only issue I'd have. Clear that up, I think --

12 THE COURT: Well, you guys can clear that up without
13 me and mark that out if that's --

14 MR. SPECHT: Fair enough.

15 THE COURT: -- not the case.

16 MR. FLECKNER: We'll take a look at that. Yes.

17 THE COURT: DX 857 is admitted.

18 (Defendants' Exhibit 857 admitted in evidence.)

19 MR. FLECKNER: Thank you, Your Honor.

20 THE COURT: Yes.

21 Q. And how does this attendance that you observed compare to
22 other committees you've worked with?

23 A. Very strong. Consistent with committees that take their
24 responsibilities seriously.

25 Q. Okay. And I think you touched a little bit, but I want to

1 make sure I got it, did you observe the Committee receiving
2 material before the meetings?

3 A. Yes, I did.

4 Q. Okay. And just -- we don't have to go through all the
5 material. There's been a lot of discussion about it. But how
6 did their receipt of information and what you observed about
7 any review of that information compare to other committees
8 that you've worked with?

9 A. I thought it was -- the material was thorough. I thought
10 it was on point, brought forth the work that the Committee
11 needed to -- to look at. And I -- as I said, I really
12 appreciated that it went to Committee members in advance so
13 that they had proper time to prepare and -- and be effective
14 in their meeting time.

15 I also appreciated that they gave due time to these
16 topics. Some other committees have scheduled, say, an hour
17 for their meeting, that's -- whatever they get through. This
18 Committee gave time and attention to the matters that counted.
19 And, again, another sign of a strong functioning Committee
20 that took its responsibility seriously.

21 Q. And did you notice that the Committee continued to debate
22 a similar issue sometimes over the course of more than one
23 meeting?

24 A. Yes.

25 Q. And did that inform your view as to whether the process

1 here functioned favorably compared to other committees that
2 you've worked with?

3 A. Yes.

4 Q. And how so?

5 A. Very much so.

6 Q. How so?

7 A. A couple of ways. I appreciated seeing that when a topic
8 got brought up that one of the Committee members suggested
9 needed to get addressed, I saw follow-up in the next Committee
10 meeting minutes or the attendance of a portfolio manager they
11 wanted to see. I appreciated seeing that there's some topics
12 that can't be finished, if you will, in one meeting, that need
13 to be reviewed and pondered and thought about from several
14 different perspectives. And some of those topics lasted
15 several meetings. And the ebb and flow of committee work is
16 typically quarterly, three times a year. It's -- these things
17 don't happen in a -- in a nanosecond. They take time to work
18 through.

19 Q. Okay. And let me pull up -- if we can pull up, Chris, DX
20 509, please. And we're showing a exemplar -- I'll call it --
21 agenda from a meeting, this one dated October 23rd, 2014.

22 Did you have an opportunity to look at the agendas
23 that the Committee set for itself for its meetings?

24 A. Yes.

25 Q. And is the DX 509 that we've identified here consistent

1 with the agendas for regular meetings, not special meetings
2 that you observed?

3 A. Yes.

4 Q. And how does this agenda compare to committees that you've
5 worked with?

6 A. Strong, solid agenda, consistent with strong performing,
7 well-performing committees.

8 Q. In --

9 A. I like the -- I like that minutes, prior minutes get
10 approved, that their performance update highlights the Watch
11 List first, that the Plan update then goes to speak to how the
12 participants are utilizing the Plan, and that they have that
13 Investment Policy Statement at the ready at every meeting
14 should they need to refer to it. And there are lots of times
15 when committees do need to refer to that Investment Policy
16 Statement, even if it's neither intended nor does typically
17 change very frequently.

18 Q. Okay. I want to dig in just a little bit to some items
19 that have been challenged by other experts in this case, by
20 plaintiffs' experts, that go particularly to the materials
21 that the Committee looked at to look at performance and to
22 look at fees.

23 So let me start maybe with Demonstrative 10, Chris.

24 Did you have the ability to review material that the
25 Committee reviewed with respect to the performance and fees of

1 the funds utilized by the Plan?

2 A. Yes.

3 Q. And at a high level, what did you observe about that?

4 A. I observed that the Committee regularly reviewed
5 investment performance and regularly reviewed fees, both at
6 the strategy and at the overall plan level. And I think it's
7 important to do both.

8 Q. Okay. Why is it important to do both?

9 A. Well, the way I've advised our committees is that one of
10 your responsibilities is that you must know what the fees are
11 of your -- of your plan. People will be asking. Participants
12 care. And there -- there are a couple of ways to tackle one
13 is. One is at the strategy level, but one of the big proof
14 statements is at the plan level.

15 Q. Okay. And -- and just at a high level, do you believe
16 that the Committee reviewed appropriate material and data to
17 allow it to monitor the performance and the fees of the funds?

18 A. Yes.

19 Q. I don't think I need to show the Court a copy of the --
20 the -- what we call the benchmark summary or BSR. We just saw
21 an example of that that looked at gross information ratio
22 data. And, again, I think you mentioned that you believe that
23 that was appropriate, correct?

24 A. Yes, I do.

25 Q. Okay. And I think the fact testimony was that those were

1 just one piece of data that the Committee looked at. Do you
2 believe that that was appropriate to utilize a panoply of data
3 to monitor the fees and the performance of the funds?

4 A. Yes.

5 Q. Okay. I'd like to -- at the risk of being just slightly
6 redundant, Your Honor, and I apologize. I'll be quick. Can
7 we pull up JX 17, page 30, which we've been well over?

8 You're familiar with this type of report showing
9 expenses by investment option that were contained in the
10 Committee materials, correct?

11 A. Yes.

12 Q. Okay. And did you have any concern with the Committee's
13 utilization of these data?

14 A. No.

15 Q. Okay. And you're aware, as the footnote -- I don't know
16 if the footnote in this one. Yeah. Yeah. The source
17 identified in this document is Lipper data in this particular
18 period, which is as of May 31st, 2011. This identifies Lipper
19 data as of 3-31-11. Do you see that?

20 A. Yes, I do.

21 Q. Okay. And are you aware that these Lipper data include
22 all share classes?

23 A. Yes, I am.

24 Q. Okay. Did you have any concerns with the Committee's
25 utilization of these Lipper data as part of their review?

1 A. No.

2 Q. Why not?

3 A. One, because they're looking at fees at the individual
4 level. Two, because the American Century Retirement Plan
5 itself was comprised of different share classes themselves --
6 the funds were not all the same share class is one way to say
7 that. And when I looked back at the Investment Policy
8 Statement, the IPS charges the Retirement Committee with
9 having fees that are competitive. And that was -- this is
10 consistent with all of that.

11 Q. Okay. Explain the second piece. You mentioned that not
12 all the funds are the same share class. What does that mean,
13 and why does that factor into your opinion?

14 A. Well, I see that the Lipper data indicates that it's not
15 based on a specific fund share class. Sometimes this data,
16 and maybe data earlier on in the period, once uses the data
17 that comes and is easiest to get at rapidly. And you can --
18 it's just facile for your committee meetings.

19 THE COURT: It's just what?

20 THE WITNESS: Facile.

21 THE COURT: Facile.

22 THE WITNESS: So you can get at it and use it
23 rapidly.

24 THE COURT: Okay.

25 A. Lipper is definitely one of many and one of the key

1 sources of this data that's perfectly fine. Earlier on,
2 getting data rapidly from Lipper was probably important for
3 this Committee. And it came initially from JPMorgan in the --
4 in their recordkeeping report and was carried through by the
5 American Century folks. And then later, they also looked at
6 fees from their recordkeeper to Charles Schwab.

7 So I think this was something initiated by their
8 recordkeeper. And so they were getting it from a third party.
9 So they were saying thank you for the ways we can look at
10 fees.

11 Q. And we'll turn to the Schwab in just a moment. But let me
12 still talk about this -- I'll call it the JPMorgan record-kept
13 era, which is before the switch to Schwab in -- 2014? 2013?

14 All right. The -- the RFP was in '13, and they
15 switched in 2014.

16 Getting back to the JPMorgan era, did you also see
17 other indications before --

18 THE REPORTER: I'm sorry.

19 Q. Yeah. Turning back to the JPMorgan record-kept era, were
20 the -- did you see any indication in the record that the
21 Committee was monitoring fees other than through this
22 particular page in the materials?

23 A. Yes.

24 Q. Okay. What did you observe?

25 A. I saw them looking at fees at the overall plan level.

1 Q. Okay. And so let's pull up JX 7, please, Chris. And
2 these are minutes dated June 30, 2010. And if we can go to
3 page 3, Chris. And if we can blow up the paragraph that
4 starts, "Ms. Benson then led a review," which is -- right,
5 that paragraph right there. The middle paragraph in Plan
6 Update.

7 Ms. Benson then led a review of the recordkeeping
8 fees received by JPMRPS, JPMorgan Retirement Plan Services,
9 and noted that a 2009 Deloitte benchmarking survey showed the
10 expense ratios for the Plan are in line with other plans its
11 size.

12 Is this an example of what you meant by looking at
13 fees at the Plan level?

14 A. Yes.

15 Q. And can you explain for the Court what the Deloitte
16 benchmarking survey is?

17 A. So Deloitte surveys a wide range of funds and plans and
18 gathers details of their fees that their 401(k) plans are --
19 are charging, are -- have, as well as separating out their
20 recordkeeping fees.

21 Q. Okay. Are the Deloitte surveys regularly used in the
22 industry?

23 A. Yes. Commonly.

24 Q. Okay. And we can pull that down, Chris.

25 Did you also observe that the Hewitt report --

1 again, which we won't bring up -- but the Hewitt report in
2 2010 also looked at fees?

3 A. Yes.

4 Q. Okay. And what was -- what did you observe Hewitt to
5 observe?

6 A. So Hewitt indicated that the recordkeeping services that
7 the American Century Plan was availing themselves of were at
8 or above the services that others were receiving and that
9 their fees were in line with others.

10 Q. Okay. And did you also observe that the Committee
11 separately looked at reports directly from JPMorgan concerning
12 the fees both of the investments and then the revenue sharing
13 component?

14 A. Yes.

15 Q. And I won't pull those up, but did that factor into your
16 conclusion about the appropriateness of how the Committee
17 looked at fees?

18 A. Yes. For me, that showed me that the Committee was
19 looking at fees at the individual strategy level, at the
20 overall Plan -- at the recordkeeping piece, and then bringing
21 that together at the overall Plan level.

22 Q. Okay. And now I'd like to move to the -- the Schwab era.
23 Did you -- I'll just pause. Did you make any observations
24 about the decision to change recordkeepers from JPMorgan to
25 Schwab?

1 A. Yes.

2 Q. Okay. What did you observe?

3 A. Well, I observed that the Committee chose to properly go
4 out to RFP, that it chose to do a full survey of potential
5 providers and look at and compare the tradeoffs of the
6 capabilities of potential providers. I think that's basics.

7 Q. And that was -- Lockton was the consultant used for that
8 RFP process?

9 A. Yes.

10 Q. And do you believe that process was conducted consistent
11 with what you view as industry practices?

12 A. Yes, indeed.

13 Q. Okay.

14 A. And also to say that looking for a new recordkeeper is not
15 something that plans do annually, right? It's a big deal. It
16 is -- State Street, where I worked for 15 years, is also a
17 very large custodian of \$33 trillion in assets under custody
18 and recordkeeping and administration. And so it wasn't my
19 area of the business, but being part of the business, I was
20 observant of that, that recordkeeping changes were a big deal.

21 I thought that the process that American Century
22 used to change recordkeepers was a very sound process by going
23 out to RFP and then looking at the -- and comparing the -- the
24 cost, capabilities and -- of their new recordkeepers.

25 Q. Okay. And now I'd like to turn to the monitoring of fees

1 during the Schwab era. Once Schwab was selected as
2 recordkeeper, did it then provide the Committee additional
3 data on fees for the Committee's consideration?

4 A. Yes.

5 Q. Okay. And let's just pull up one example. DX 511. So
6 these are materials from July 2015 after Schwab has been
7 selected. And let's, just for an example, Chris, pull up page
8 91 of these materials.

9 And I'll just highlight here, for example -- this is
10 one of the pages of the data that Schwab provided the
11 Committee. And I've circled the beginning of the column that
12 starts net expense ratio and rank. Do you see that?

13 A. Yes.

14 Q. And is this what you meant by the additional data that
15 Schwab provided?

16 A. Yes.

17 Q. Okay. And what was Schwab doing here?

18 A. So here, if we just take the first line, the American
19 Century Diversified Bond Fund in the R6 share class, they
20 identify the category or the asset class. Whoops.

21 Q. No. That's great.

22 A. And the -- so the net expense ratio of the strategy was 35
23 basis points. The average expense ratio for the -- for the
24 sector was 87 basis points in the rank -- and it identified
25 the rank as well.

1 Q. Okay. And so the rank 6th in the asset category, that's a
2 good rank. Six is a top rank, not a bottom rank, correct?

3 A. Correct.

4 Q. Okay. And are these data that -- comparative fee data
5 that Schwab were providing?

6 A. Excuse me?

7 Q. The --

8 A. Yes. This is the fee data provided by Schwab.

9 Q. Okay. And did you have any concerns with the fee data
10 that Schwab provided the Committee for its review?

11 A. No. And this -- at this point, in 2013/14 was then --
12 recordkeepers typically provided information at the, you know,
13 more detailed level because data was -- as time goes on and
14 tools and data analysis evolved, there was -- they were able
15 to get data at the net level as well.

16 Q. Okay. So was utilizing Schwab's data as one input
17 consistent with committee practices that you observed?

18 A. Yes.

19 Q. Okay. Let's pull this down, Chris.

20 And I want to -- did you also observe that Schwab
21 was providing Plan level data to the Committee?

22 A. Yes.

23 Q. Okay. And let's pull up JX 39. And these are more
24 materials from 2015 that were provided to the Committee. And
25 Let's focus on page 114, please, Chris. And, Chris, if we can

1 blow up the data on the top of this page.

2 Are these the Plan level fee data that Schwab was
3 providing the Committee that you referenced?

4 A. Yes.

5 Q. Okay. And can you explain what's being shown here?

6 A. So -- sure. The shareholder servicing compensation at the
7 top is the recordkeeping and other trust services. The
8 overall expense ratio is for the investment management
9 component. And Schwab calls that third party funds because
10 these are not Schwab's own funds. And then they total up the
11 fees, divide them by the assets, and give them as a percent of
12 the portfolio as well as just for also use per participant.

13 So 63 basis points is the -- is the all-in fee at this point.

14 Q. Okay. So we've looked at a lot of different fee data that
15 the Committee's reviewed from the JPMorgan era and from the
16 Schwab era. In toto, did you believe that the Committee was
17 looking at an appropriate amount of fee data?

18 A. Yes. Absolutely.

19 Q. And did you believe that the Committee was looking at
20 appropriate types of fee data?

21 A. Yes.

22 Q. And was the Committee's review of the fee data as one
23 input consistent with the type of review of fee data that you
24 observed in the industry?

25 A. Yes, it was.

1 Q. Okay. We can pull that down.

2 A. And -- and I would also say maybe better than some. Not
3 all committee members of DC plans, at least earlier in the
4 class period, were -- were aware of what the all-in fees were.
5 And for me, I'm a top down contextual person. I want to see
6 at the top level and then the pieces as well.

7 And so I've counseled clients that I've worked with,
8 whether they be DB, DC or endowment or foundation to know what
9 the all-in fees are and be able to see those and look at those
10 over time.

11 Q. Okay. So that's the Plan level data --

12 A. That's right.

13 Q. -- fee data that we were talking about?

14 A. That's right.

15 Q. Okay. You've opined that you believe the Committee was
16 looking at appropriate fee data. Did you form any opinions as
17 to whether the Committee took appropriate actions with respect
18 to expenses for this Plan?

19 A. Yes, they did. Yes, I did.

20 Q. Okay. And what are those opinions?

21 A. That, yes, they did.

22 Q. Okay. And how did you observe that?

23 A. One, I saw the overall plan fees coming down. And, two, I
24 saw it as part of the meeting minutes and part of the record
25 the changes to less expensive share classes over time.

1 Q. Okay. So let's take those in steps. Chris, if you can
2 pull up DX 858, Mann Demonstrative 11.

3 What is DX 858 showing us, Ms. Mann?

4 A. This is a summary that I wanted compiled so I could see
5 was there some proof statement that the Retirement Committee
6 brought fees down. And so from 2010 to 2016, we see the fees
7 on the overall Plan level coming down from 82 to 58 basis
8 points. And that's a drop of 29 basis points and a
9 substantial reduction in cost to participants.

10 Q. Okay. And -- and you said you had this chart compiled
11 from data that you looked at in this case. Is that accurate?

12 A. Yes. From either JPMorgan or from Schwab.

13 MR. FLECKNER: Okay. Your Honor, we move the
14 admission of DX 858.

15 THE COURT: Any objection to 858?

16 MR. SPECHT: No. No objection, Your Honor.

17 THE COURT: Thank you. 858 is admitted.

18 (Defendants' Exhibit 858 admitted in evidence.)

19 Q. Okay. You talked about overall fee costs, but then you
20 also talked about a review of specific minutes. So perhaps we
21 can pull up now DX 859, which was Mann Demonstrative 12. Is
22 this addressing the second part of your earlier answer?

23 A. Yes, it is. And don't laugh at this picture that I wanted
24 created. So across the bottom are the meetings in either a
25 green square, the regular meetings, or the special meetings,

1 that purply blue star. And I wanted to see the -- I wanted to
2 see a list of the changes that the Committee made. And so
3 these are done according to the resolution date. So, for
4 example, the first one is April 6th, 2011, to switch three
5 plan funds to CITs and was a reduction in basis points of a
6 range of 19 to 22 basis points. And that's how each of these
7 goes. So, for example, the January 2, 2014, resolution to
8 switch ten mutual funds to CITs was a reduction of between 8
9 and 30 basis points.

10 Q. Okay. And I see that with respect to the July 9th, 2013,
11 box, it looks like there's two separate boxes. Can you
12 explain what's being shown there?

13 A. So July 9th is -- is a change from 12 funds to the R6
14 share class. And there's a resolution to switch one fund,
15 mutual fund, to a CIT.

16 Q. I see. So those are two different fee reduction actions
17 taken at that same meeting; is that correct?

18 A. That's correct.

19 Q. Okay. So this identifies, it looks like -- one, two,
20 three, four, five -- six meetings where there's specific
21 reductions in share classes or movement from mutual funds to
22 CITs resulting in lower fees for participants, correct?

23 A. Correct.

24 Q. And then you also identify the June 13th, 2016, resolution
25 to add five Vanguard mutual funds. Why did you include that

1 on this chart?

2 A. I wanted to see other ways that the Committee offered less
3 expensive share classes and/or funds.

4 MR. FLECKNER: Okay. And we move the admission of
5 DX 859.

6 MR. SPECHT: No objection.

7 THE COURT: Thank you. 859 is admitted.

8 (Defendants' Exhibit 859 admitted in evidence.)

9 Q. And what opinion did you draw from the data that you
10 reviewed and compiled that are contained in DX 859?

11 A. That this Committee was working diligently. And when
12 their -- the criteria was met for the ability to utilize lower
13 cost share classes, just like it states in their Investment
14 Policy Statement, they sought to utilize those less expensive
15 share classes in the Plan.

16 Q. Okay. There's been some suggestion earlier in this case
17 that there was a period of time when the Plan was
18 transitioning recordkeepers from JPMorgan to Schwab that at
19 about that time period, R6 share classes of a number of funds
20 had been made available to the marketplace but weren't
21 utilized immediately by the Plan. Are you familiar with that
22 assertion?

23 A. Yes.

24 Q. Okay. And did you form an opinion as to whether there was
25 any undue delay of the switch of share class during that time

1 period?

2 A. No. I saw that there was a delay; however, knowing what I
3 know and -- and seeing what a big deal it is to change
4 recordkeepers, including having a blackout period where
5 participants can't do anything, that it seemed to me that
6 based on the dialogue in the meeting minutes that the
7 Committee was prioritizing moving to its new recordkeeper
8 rather than trying to get the old recordkeeper to change data.

9 It sort of made me think about when you're buying a
10 house, do you want the seller to make the changes that you
11 need made before you buy the house, or do you, when you buy
12 that house, want to be the one responsible for either hiring
13 the contractor or doing the work to your new house? And so to
14 me, it seemed like the right incentive to get the right -- I
15 mean, this is meant to be long-term plan, long-term decisions,
16 that were moving in the right direction. I didn't see any
17 issue with that delay.

18 Q. Okay. So based on your review of the record, was the --
19 we'll call it the delay at that time period appropriate and
20 consistent with what you would anticipate seeing from a
21 prudent committee process?

22 A. Yes. I also thought that -- it seemed in the record that
23 there may have been assumptions that that -- that the new
24 recordkeeper would be able to bring on the R6 share classes
25 right away, but they later found out that that wasn't going to

1 be possible immediately. So I don't think it was necessarily
2 intended or understood that way.

3 Q. Okay. If we can pull up Mann 13, Chris. Just the last
4 piece of this section that I wanted to cover with you.

5 We've talked about how the Committee looked at
6 performance and fee data. Did you have the opportunity to
7 review what they did with respect to reviewing data on the
8 participant experience?

9 A. Yes.

10 Q. Okay. And what did you observe?

11 A. Well, this was a regular agenda item. And the Committee
12 wanted to see how the participants were utilizing the Plan
13 across a range of different measures. I took from the record
14 that there are a number of occasions where the dialogue
15 indicated that the Committee members were really seeking out
16 maybe places where certain participants might need additional
17 education or where the strong investment savvy of the populous
18 could tolerate good -- good habits, some of the decisions that
19 it made as well.

20 Q. So let's move to Demonstrative 14.

21 Again, just -- is this a summary of the type of
22 information about the participant experience that the
23 Committee reviewed?

24 A. Yes.

25 Q. Why don't you go through it with us.

1 A. Again, I think it's important to note that there is a -- a
2 range of ways to look at plans and oversee them and manage
3 them. One of the things that this Committee did well was to
4 think about its particular Plan participant base. And they
5 recognized the sophisticated levels of the investment -- of
6 the organization as well as being able to provide education if
7 it needed. And then they also wanted to -- I liked seeing the
8 data that also backed this up and showed how and that
9 participants were utilizing the Plan through account balances,
10 deferral rates and participation rates.

11 Q. Do you believe that it was appropriate for the Committee
12 to take into account the -- what it perceived as the
13 sophistication of its participant base?

14 A. Yes, absolutely.

15 Q. Okay. And there's been some discussion in the case that
16 perhaps this participant base wasn't all that sophisticated.
17 Is that consistent with your observations and review of the
18 record?

19 A. I would say noting that the participant base was
20 sophisticated is consistent with what I expected. At the same
21 time, I also expected that there are, of course, outliers of
22 people who aren't completely investment savvy as well.

23 Q. Okay. You mentioned before a proof statement.

24 A. Yes.

25 Q. Did you see any proof statements in the record that

1 supported your view of the sophistication level of this
2 participant base?

3 A. Yes. I saw several mentions of it in the Committee
4 meeting minutes. I saw the sophistication of the participant
5 base mentioned in the RFP work by Lockton.

6 Q. And let's pause there. I don't think this is a document
7 we've seen so far in the case. If we can -- ah, it's below
8 the staple. If we can pull up, Chris, DX 570, please.

9 And you mentioned the RFP results. Again, these are
10 RFP results as to the recordkeeping change, correct?

11 A. Yes.

12 Q. So these are materials that aren't looking specifically at
13 what investments to utilize, but these are materials looking
14 at how to select a new recordkeeper and what might be useful,
15 correct?

16 A. Yes.

17 Q. And let's turn to the second page, Chris. I'm sorry, the
18 22nd page, Chris. And let's blow up, if we could, the third
19 and fourth diamonds, we'll call them.

20 And these two -- well, why don't you tell us how
21 this factored into your views?

22 A. So one of the key things that a consultant does is they
23 try to identify what are some of the key themes that a client
24 would like in their search. And you can see at the top of
25 this page, these are called Areas of Importance for American

1 Century. And two of these bullets here indicated that they
2 were seeking or would benefit from a call center for
3 participant questions sensitive to the advanced knowledge
4 level of and industry experience of the American Century
5 participants. And as well, that employee education should be
6 tailored to the sophistication of the participants.

7 Q. And the minutes that you referred to earlier oftentimes --
8 and I think we've shown the Court, so I won't go back through
9 that again -- showed that there was discussion of
10 sophistication of participants when it came to investments.
11 This is also identifying the same investment sophistication
12 and how it might relate to the recordkeeping needs. Is that
13 fair?

14 A. That's right.

15 Q. Okay. And from your review of the record, do you share
16 the view that this Plan's participant base was, in some
17 regards, a sophisticated participant base?

18 A. Yes.

19 Q. Okay. And how do you derive that conclusion?

20 A. I wanted to see some of that data myself. So I looked at
21 how many registered representatives to see that it was
22 quantifiable, how many portfolio managers are at American
23 Century. And that number was quite a large number, over 400
24 registered representatives, 70 portfolio managers. And the
25 Plan's active base was about 1,200 -- 1,200 participants.

1 So of present employees -- and knowing what I know
2 about asset management firms, that in addition to portfolio
3 managers, there are a large number of analysts and other
4 support people who work in the investment part of the
5 organization and the personnel who work selling the strategies
6 of that asset management firm who are all well aware of the
7 investment tradeoffs and are pretty savvy in terms of
8 investments.

9 Q. So --

10 A. To very savvy.

11 Q. So just to summarize, you have about a third of the
12 participant base that you observe from your research that were
13 registered representatives or portfolio managers, correct?

14 A. Yes.

15 Q. And of the other two-thirds of the participants, you have
16 formed a view, based on your experience and what you've
17 observed in the record, that some of those may also be
18 sophisticated; is that fair?

19 A. Yes. That's correct.

20 Q. Okay. And again, that's because of their relation to a
21 organization whose mission is asset management, correct?

22 A. Yes. This is the business of their business. When you
23 are in the asset management business, you are aware of what's
24 happening to the general markets. You are aware of how your
25 strategies are performing. You are aware of what's happening

1 overall in the mutual fund or 401(k) and DB business.

2 Q. Okay. And not all of the 1,200 or 1,300 participants
3 might themselves be personally sophisticated. Did you see any
4 evidence in the record that the Committee sought to reach out
5 to those people who might need a little more assistance in
6 making choices for their 401(k) plan?

7 A. Yes.

8 Q. And what did you observe?

9 A. I saw comments in the meeting minutes indicating that
10 there might be participants who would need additional
11 education. And as far as the Plan was concerned, during the
12 JPMorgan era, there was Financial Engines, and during the
13 Schwab era, Guided Choice, where individuals could speak on a
14 phone for custom information about their particular situation.

15 Q. Okay. And just again remind us what the Guided Choice
16 was?

17 A. A similar type of plan -- program to Financial Engines
18 where participants would be able to talk about their custom
19 needs and seek guidance as to asset allocation or fund ideas.

20 Q. Okay. And did you view this attention to the
21 participants' sophistication levels or needs to be appropriate
22 for this Plan?

23 A. Yes. Very much.

24 Q. And did you view it to be consistent with good fiduciary
25 practices that you've observed in your career?

1 A. Yes. Absolutely. So a diversified plan lineup, education
2 where it was needed, a PCRA for those folks who wanted to go
3 out and find -- identify their own strategies is -- was the
4 hallmark of a -- a strong plan.

5 Q. Okay.

6 THE COURT: You got about five minutes left, sir.

7 MR. FLECKNER: Understood. Thank you, Your Honor.

8 I might not finish my direct today but --

9 THE COURT: I understand.

10 MR. FLECKNER: -- it won't be too long tomorrow
11 morning.

12 Q. So in these five minutes today, Ms. Mann, did you observe
13 that the Committee reviewed deferrals -- I think there was
14 some discussion even this morning when you were in the
15 courtroom where Mr. Cowherd was presented with some data from,
16 both plaintiffs and myself, about the deferral rates and the
17 elections of participants. Did you observe that that was
18 something that the Committee was looking at as part of its
19 regular process?

20 A. Yes. I saw that as a very good practice to observe and
21 look at those -- at those levels. Yes.

22 Q. Okay. And -- and did you yourself look at the deferral
23 levels of participants in this plan?

24 A. Yes.

25 Q. Okay. And actually, first, let me ask, why did you

1 believe it was a good practice of the Committee members to
2 look at the deferrals?

3 A. Because it's critical for a committee to understand how
4 its plan is being used. If participants are not using their
5 plan, or if they're not saving at all, then that's a sign that
6 they may need to make change or seek other information. But
7 this plan had -- had numbers that I -- I wanted to see and so
8 chart out for myself.

9 Q. Okay. And the fact that part of the meeting materials
10 included participation levels, did you feel that was a good
11 fiduciary practice based on your experience?

12 A. Yes, indeed.

13 Q. Okay. So let's take a look at the results of some of your
14 own analysis. If we can pull up DX 860, which is Mann
15 Demonstrative 15, Chris.

16 Is this the result of the independent review you
17 conducted of the deferral rates of this plan?

18 A. So -- yes. I gathered the data that was available from
19 2011 to 2015. And the darker blue bars are the participation
20 rates for defined contribution plans on average. The -- and
21 that's about, let's call it, 75 percent. Then I wanted to see
22 American Century's Plan -- that's sort of the teal color on
23 the left -- between 93, 94, let's call it 95 percent-ish
24 across the board. This Plan is -- has participation rates
25 from most of the employees who are able to -- to participate

1 in the Plan that are even higher than those in defined
2 contribution plans that provide auto-enrollment. And I think
3 we heard earlier the -- one of the importances of
4 auto-enrollment and this notion of nudging.

5 Q. And so just to fill out the record, when you say that the
6 participation rates in this plan are even higher than those of
7 plans that use auto-enrollment, the auto-enrollment figure is
8 the third bar for each year in green on the right-hand side,
9 correct?

10 A. That's correct.

11 THE COURT: And that auto-enrollment number is
12 not -- well, it just started at American Century, so it's not
13 related to -- that's just the industry auto-enrollment.

14 THE WITNESS: That's correct.

15 THE COURT: Okay.

16 Q. Yeah. The green line is the industry auto-enrollment.
17 And I think the idea here -- and Ms. Mann can correct me if
18 I'm wrong, but the idea here is that even when accounting for
19 the use of auto-enrollment, we still see -- or you tell me, do
20 you still see high --

21 A. Extremely high usage rates. Right. And I saw the more
22 recent data, which shows it even higher at 97 percent more
23 recently.

24 Q. Right. Because these data, which were reflected in your
25 report, only go up to year-end 2015, correct?

1 A. Correct.

2 MR. FLECKNER: Okay. And I'd like to move the
3 admission of DX 860.

4 MR. SPECHT: No objection.

5 THE COURT: Thank you. DX 860 is admitted.

6 (Defendants' Exhibit 860 admitted in evidence.)

7 Q. Okay. And did you draw any conclusions from the deferral
8 rates in this plan contained in DX 860?

9 A. Yes.

10 Q. And what -- what conclusions did you draw?

11 A. Participants like this Plan, use this Plan, are invested
12 in this Plan. There are incentives for them to save. This is
13 very solid -- this is extremely solid performance. It's
14 almost like participation rates can barely go higher.

15 Q. Okay. And there was also some discussion, as you might
16 have seen in the Hewitt report, that for some plans having too
17 many funds could lead to something called choice overload that
18 would reduce participation rates. Did you draw any
19 conclusions about whether there was choice overload or too
20 many funds based on these data?

21 A. I did not.

22 Q. You did not draw any conclusions?

23 A. I -- I did draw conclusions.

24 Q. And what conclusions were those?

25 A. That there was -- there was no -- there was no confusion

1 based on -- based on the number of options.

2 Q. Okay.

3 MR. FLECKNER: I know we're at our limit, and I'm at
4 a stopping point, Your Honor.

5 THE COURT: All right. Thank you --

6 THE WITNESS: Thank you very much.

7 THE COURT: -- Ms. Mann. We'll see you tomorrow.
8 And we'll be in recess. I look forward to seeing you
9 tomorrow. Thank you all.

10 MR. FLECKNER: Thank you, Your Honor.

11 THE WITNESS: Thank you, Your Honor.

12 (Proceedings concluded at 4:44 p.m.)

13 C E R T I F I C A T E

14 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM
15 THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

16
17 /s/Regina A. Lambrecht
18 REGINA A. LAMBRECHT, RDR, CRR
Official Court Reporter

19 October 4, 2018
20 DATE

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